(16,101.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 382.

GEORGE SCHOLLENBERGER, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 29, 1896.

1 *Petition for Writ of Error.*

To the Honorable George Shiras, Jr., associate justice of the Supreme Court of the United States of America:

The petition of George Schollenberger respectfully showeth—

That the Commonwealth of Pennsylvania brought suit against your petitioner into the supreme court of Pennsylvania for the eastern district, to July term, 1894, number 104, by an appeal from the judgment of and certiorari to the court of quarter sessions of Philadelphia county, October term, 1893, number 368, in which suit in said supreme court your petitioner was appellee and defendant in said court of quarter sessions and The Commonwealth of Pennsylvania was appellant and plaintiff in said court of quarter sessions.

That your petitioner was criminally indicted by the grand jury of said court of quarter sessions for an alleged violation of a certain act of the General Assembly of the Commonwealth of Pennsylvania of May 21st, 1885, the provisions of which are as follows:

2 "That no person, firm, or corporate body shall manufacture out of any oleaginous substance or any compound of the same, other than that produced from unadulterated milk or cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk, or cream from the same, or of any imitation or adulterated butter or cheese, nor shall sell or offer for sale or have in his, her, or their possession with intent to sell the same as an article of food."

That violations of the said act are made a misdemeanor, punished by a fine and imprisonment.

That on November 16th, 1893, the defendant pleaded not guilty in said suit, and on the same day a jury being called found a special verdict embodying the following facts:

That the defendant was the duly authorized agent of The Oakdale Manufacturing Company of Providence, Rhode Island, and as such agent was engaged in business in said city of Philadelphia as a wholesale dealer in oleomargarine and was not engaged in any other business, and as such agent had paid the U. S. internal-revenue tax on the business of a wholesale dealer in oleomargarine under act of Congress of August 2nd, 1886.

That on or before the second day of October, 1893, the said Oakdale Manufacturing Company shipped from Providence,
3 Rhode Island, to said defendant a tub of oleomargarine, containing forty pounds, manufactured by the said The Oakdale Manufacturing Company.

That said package was an original package of such form, size, and weight as is used by producers and shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce, and said form, size, and weight were adopted in good

faith and not for the purpose of evading the laws of the Commonwealth of Pennsylvania.

That on the said second day of October, in the said city of Philadelphia, at the place of business aforesaid, the said defendant, as wholesale dealer as aforesaid, sold the said tub or package, the oleomargarine therein contained remaining in the original package, being the same package, with seals, marks, stamps, and brands unbroken, in which it was packed by said manufacturer in the said city of Providence, Rhode Island, and thence transported into the city of Philadelphia and delivered by the carrier to the defendant, and the said tub was not broken or opened on the said premises, and as soon as it was purchased it was removed from the said premises.

That there was no attempt or purpose on the part of defendant to sell the article as butter or any understanding on the part
4 of the purchaser that he was buying anything but oleomargarine, and the said oleomargarine is recognized by the act of Congress of August 2nd, 1886, as an article of commerce.

That on April 18th, 1894, the said court of quarter sessions entered a judgment upon the record upon the special verdict for defendant.

That on May 26th, 1894, The Commonwealth of Pennsylvania, plaintiff, sued out a writ of error to the said supreme court of the said State.

That on October 7th, 1895, the supreme court of Pennsylvania ordered the said judgment reversed and entered judgment on the said special verdict in favor of the Commonwealth of Pennsylvania, and said judgment was duly entered and recorded in the eastern district of Pennsylvania.

That said judgment of the said supreme court is a judgment of the highest court of record of the Commonwealth of Pennsylvania.

That said judgment of the said court is final.

That the right, title, privilege, and immunity claimed by your petitioner, defendant and appellee aforesaid, were claimed under the Constitution of the United States of America, art. I, sect. 8, providing, among other things, that Congress shall have power "to regulate commerce with foreign nations and among the several States and with the Indian tribes."

That the decision and judgment of the supreme court of Pennsylvania aforesaid was against the right, title, privilege, and immunity so claimed.

5 That said act of the General Assembly of the Commonwealth of Pennsylvania of May 21st, 1885, was and is null and void so far as it attempts to prohibit the sale of an article of commerce in the original package of commerce in the interstate commerce of the States, and therefore the said judgment of the said supreme court is null and void and contrary to the Constitution and statute laws of the United States of America in the premises.

Your petitioner therefore prays for the allowance of a writ of error to the supreme court of Pennsylvania for the eastern district

in order that said judgment of the supreme court of Pennsylvania may be re-examined and reversed or affirmed in the Supreme Court of the United States of America.

And he will ever pray.

GEORGE SCHOLLENBERGER.

George Schollenberger, being duly sworn according to law, deposes and says that the facts set forth in the above petition are true to the best of his knowledge and belief.

GEORGE SCHOLLENBERGER.

Sworn and subscribed before me this 14th day of October, 1895.

SAMUEL BELL,
Commissioner Circuit Court U. S.,
Eastern District of Pennsylvania.

And now, to wit, October 15th, 1895, citation awarded and writ of error allowed by me; bond to be given in a penalty of $200.00.

GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

True copy.

[Seal U. S. Circuit Court, E. D. Pennsylvania.]

SAMUEL BELL,
Clerk C. C. U. S., E. D. of Pa.

5½ [Endorsed:] 104. July term, 1894, S. C. Pa. Commonwealth of Pennsylvania *v.* George Schollenberger. Petition for citation. Writ of error. A. B. Roney, for petitioner.

6 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the chief justice and associate justices of the supreme court of the Commonwealth of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said Commonwealth in which a decision could be had in the said suit between the Commonwealth of Pennsylvania and George Schollenberger, July term, 1894, No. 104, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said Commonwealth, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privileges, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commis-

7

sion, a manifest error hath happened, to the great damage of the said George Schollenberger, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, the sixteenth day of October, in the year of our Lord one thousand eight hundred and ninety-five.

Seal U. S. Circuit Court, E. D. Pennsylvania.

SAMUEL BELL,
Clerk Circuit Court United States, Eastern District of Pennsylvania.

7½ [Endorsed:] Supreme court of Pennsylvania, eastern district, July term, 1894. No. 104. George Schollenberger *vs.* Commonwealth of Pennsylvania. Writ of error. Filed Oct. 18, 1895, in supreme court.

8 UNITED STATES OF AMERICA, *ss:*

To the Commonwealth of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden within thirty days, at Washington, pursuant to a writ of error filed in the prothonotary's office of the supreme court of Pennsylvania for the eastern district, wherein George Schollenberger is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville Weston Fuller, Chief Justice of the Supreme Court of the United States, this eighteenth day of October, 1895.

GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

Service accepted.
GEO. S. GRAHAM, *Dist. Att'y.*

Oct. 29, '95.

8½ [Endorsed:] Supreme court of Pennsylvania, eastern district, July term, 1894. No. 104. Commonwealth of Pennsylvania *v.* George Schollenberger. Copy of citation.

9 In the Supreme Court of Pennsylvania in and for the Eastern District of Pennsylvania.

COMMONWEALTH OF PENNSYLVANIA
vs.
GEORGE SCHOLLENBERGER.
} July Term, 1894. No. 104.

Know all men by these presents that we, George Schollenberger and Dennis Kennedy, are held and firmly bound unto the Commonwealth of Pennsylvania in the full and just sum of two hundred dollars, to be paid to the said The Commonwealth of Pennsylvania, its certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 16th day of October, 1895.

Whereas lately, at a term of the supreme court of Pennsylvania in and for the eastern district of Pennsylvania, in a suit depending in said court between The Commonwealth of Pennsylvania, appellant, and George Schollenberger, appellee, judgment was rendered against the said appellee, and the said appellee having obtained a
10 writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The Commonwealth of Pennsylvania, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said George Schollenberger, appellant in said Supreme Court of the United States, shall prosecute his writ of error to effect and answer all damages and costs if he fails to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

GEORGE SCHOLLENBERGER. [SEAL.]
DENNIS KENNEDY. [SEAL.]

Sealed & delivered in the presence of us—
JOHN RODGERS.
HARRY S. FINCH.

I approve of the above bond on behalf of the Commonwealth of Pennsylvania.

GEO. S. GRAHAM,
District Attorney,
Per THOMAS W. BARLOW,
Ass't Dist. Att'y.

The above bond approved Oct. 18, '95.

GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the U. States.

I hereby certify that the above is a true and correct copy of the bond filed in above-entitled case.

In testimony whereof I have hereunto set my hand and the seal of said court, at Philadelphia, this 23rd day of October, A. D. 1895.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

CHAS. S. GREENE,
Prothonotary.

10½ [Endorsed:] Supreme court of Pennsylvania, July term, 1894. No. 104. Commonwealth of Pennsylvania *v.* George Schollenberger. Copy of bond.

11 In the Supreme Court of Pennsylvania in and for the Eastern District.

Among the records and proceedings of the supreme court of Pennsylvania in and for the eastern district the following is thus contained:

Docket Entries.

COMMONWEALTH OF PENNSYLVANIA, Plaintiff, *vs.* GEORGE SCHOLLENBERGER, Defendant. } No. 104. July Term, 1894.

A. Morton Cooper, Carroll R. Williams; George S. Graham, district attorney. 104.

Appeal of plaintiff from the court of quarter sessions of the county of Philadelphia filed May 26, 1894.

Eo die, certiorari exit, returnable the first Monday of January, 1895.

December 27, 1894—Record returned and filed.

January 7, 1895—Assignments of error filed.

January 18, 1895—Argued.

12 October 7, 1895—The judgment is reversed and judgment is entered in favor of the Commonwealth upon the special verdict.

The record is remitted for purposes of sentence and execution.

Opinion by Williams, J.

October 18, 1895—Copy of petition for writ of error to the Supreme Court of the United States brought into office.

Eo die, writ of error brought into office.

Eo die, copy of citation brought into office.

Bond filed.

October 29, 1895—Copy of acceptance of service of citation brought into office.

I hereby certify that the above and foregoing is a true and correct copy of the docket entries in the above-entitled case so full and entire as appears of record in our said supreme court.

Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.

In testimony whereof I have hereunto set my hand and seal of said court, at Philadelphia, this twenty-third day of October, A. D. 1895.

CHAS. S. GREENE,
Prothonotary.

Appeal and Affidavit.

In the Supreme Court of Pennsylvania for the Eastern District.

13 (*Appeal and Affidavit.*)

Court of Quarter Sessions of the County of Philadelphia, October Term, 1893.

COMMONWEALTH OF PENNSYLVANIA, Plaintiff, Appellant,
vs.
GEORGE SCHOLLENBERGER, Defendant, Appellee. } No. 368.

Enter appeal on behalf of Commonwealth of Pennsylvania from the judgment of the court of quarter sessions of the county of Philadelphia entered in the above case on April 18, 1894.

A. MORTON COOPER,
CARROLL R. WILLIAMS,
GEORGE S. GRAHAM, *District Attorney,*
Attorneys for Plaintiff.

To Charles S. Greene, proth'y sup. ct., E. D.

COUNTY OF PHILADELPHIA, *ss:*

Eastburn Reeder, being duly affirmed, saith that the above appeal is not intended for delay.

EASTBURN REEDER.

Affirmed and subscribed this 15th day May, A. D. 1894.

CHARLES S. GREENE,
Prothonotary.

Endorsement: No. 104. July term, 1894, supreme court of Pennsylvania, eastern district. Commonwealth of Pennsylvania, appellant, *vs.* George Schollenberger. Appeal and affidavit. A. Morton Cooper, Carroll R. Williams; George S. Graham, district attorney. Filed May 26, 1894, in supreme court.

14 *Precipe for Certiorari.*

In the Supreme Court of Pennsylvania for the Eastern District.

COMMONWEALTH OF PENNSYLVANIA, Plaintiff, Appellant, *vs.* GEORGE SCHOLLENBERGER, Defendant, Appellee.	No. 368. Certiorari to the Court of Quarter Sessions of the County of Philadelphia, of October Term, —.

Issue certiorari to the court of quarter sessions of the county of Philadelphia to bring up record and proceedings in a certain action in said court, No. 368, October term, 1893, wherein Commonwealth of Pennsylvania is plaintiff and George Schollenberger is defendant.

Returnable to next term *sec. reg.*

A. MORTON COOPER,
CARROLL R. WILLIAMS,
GEORGE S. GRAHAM, *District Attorney,*
Attorneys for Plaintiffs and Appellants.

To Charles S. Greene, proth'y sup. court, E. D.

Endorsement: No. 104. July term, 1894, supreme court of Pennsylvania, eastern district. Commonwealth of Pennsylvania, appellant, *vs.* George Schollenberger. Precipe for certiorari. A. Morton Cooper, Carroll R. Williams; George S. Graham, district attorney. Filed May 26, 1894, in supreme court.

15 *Record of the Court of Quarter Sessions of the County of Philadelphia.*

Writ of Certiorari.

EASTERN DISTRICT OF PENNSYLVANIA, *City and County of Philadelphia,* } *ss:*

The Commonwealth of Pennsylvania to the justices of the court of quarter sessions for the county of Philadelphia, Greeting:

We, being willing for certain causes to be certified of the matter of the appeal of Commonwealth of Pennsylvania from the judgment in No. 368, October sessions, 1893, wherein the said appellant was plaintiff and George Schollenberger was defendant—

Judgment entered in the above case on April 18, 1894, before you or some of you depending, do command you that the record and proceedings aforesaid, with all things touching the same, before the justices of our supreme court of Pennsylvania, at a supreme court to be holden at Philadelphia, in and for the eastern district, the first Monday of January next, so full and entire as in our court before you they remain, you certify and send, together with this writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

Witness the Honorable James P. Sterrett, doctor of laws, chief justice of our said supreme court, at Philadelphia, the [SEAL.] twenty-sixth day of May, in the year of our Lord one thousand eight hundred and ninety-four.

CHARLES S. GREENE,
Prothonotary.

16 Endorsement: 368. October session, 1893. Quarter sessions. Philadelphia. No. 104. July term, 1894, supreme court. Commonwealth of Pennsylvania, appellant, *vs.* George Schollenberger. Certiorari to the court of quarter sessions for the county of Philadelphia, returnable the first Monday of January, 1895. Rule on the appellee to appear and plead on the return day of the writ. Brought into office May 26, 1894. A. Morton Cooper, Carroll R. Williams; George S. Graham, district attorney.

To the honorable the judges of the supreme court of the Commonwealth of Pennsylvania, sitting in and for the eastern district:

The record and process and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

J. I. CLARK HARE. [L. S.]

Filed Dec. 27, 1894, in supreme court.

True Bill.

CITY AND COUNTY OF PHILADELPHIA, *ss:*

In the Court of Quarter Sessions of the Peace for the City and County of Philadelphia, October Sessions, 1893.

The grand inquest of the Commonwealth of Pennsylvania, inquiring for the city and county of Philadelphia, upon their respective oaths and affirmations do present that George Schollenberger, late of the said county, yeoman, on the second day of October, in the year of our Lord one thousand eight hundred and ninety-three, at the county aforesaid and within the jurisdiction of this court, did then and there unlawfully sell as an article of food a certain article manufactured out of some oleaginous substance and compound
17 of the same other than that produced from unadulterated milk and cream from the same, the said article being designed to take the place of butter produced from pure, unadulterated milk and cream from the same, contrary to the from of the act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the grand inquest aforesaid upon their oaths and affirmations aforesaid do further present that the said George Schollenberger, late of the said county, yeoman, on the second day of October, in the year of our Lord one thousand eight hundred and ninety-three, at the county aforesaid and within the jurisdiction of this court, did

then and there unlawfully sell as an article of food a certain substance in imitation of butter, contrary to the form of the act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the grand inquest aforesaid upon their respective oaths and affirmations aforesaid do further present that the said George Schollenberger, late of the said county, yeoman, on the second day of October, in the year of our Lord one thousand eight hundred and ninety-three, at the county aforesaid and within the jurisdiction of this court, did then and there unlawfully sell as an article of food adulterated butter, contrary to the form of the act of the General
18 Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the grand inquest aforesaid upon their oaths and affirmations aforesaid do further present that the said George Schollenberger, late of the said county, yeoman, on the second day of October, in the year of our Lord one thousand eight hundred and ninety-three, at the county aforesaid and within the jurisdiction of this court, did then and there unlawfully offer for sale as an article of food a certain article manufactured out of some oleaginous substance and compound of the same other than that produced from unadulterated milk and cream from the same, the said article being designed to take the place of butter produced from pure, unadulterated milk and cream from the same, contrary to the form of the act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the grand inquest aforesaid upon their oaths and affirmations aforesaid do further present that the said George Schollenberger, late of the said county, yeoman, on the second day of October, in the year of our Lord one thousand eight hundred and ninety-three, at the county aforesaid and within the jurisdiction of this court,
19 did then and there unlawfully offer for sale as an article of food a certain article in imitation of butter, contrary to the form of the act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the grand inquest aforesaid upon their oaths and affirmations aforesaid do further present that the said George Schollenberger, late of the said county, yeoman, on the second day of October, in the year of our Lord one thousand eight hundred and ninety-three, at the county aforesaid and within the jurisdiction of this court, did then and there unlawfully offer for sale as an article of food adulterated butter, contrary to the form of the act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the grand inquest aforesaid upon their respective oaths and affirmations aforesaid do further present that the said George Schollenberger, late of the said county, yeoman, on the second day of October, in the year of our Lord one thousand eight hundred and ninety-three, at the county aforesaid and within the jurisdiction of this

court, did then and there have in his possession, with intent
20 to sell as an article of food, a certain article manufactured out of some oleaginous substance and compound of the same other than that produced from unadulterated milk and cream from the same, the said article being designed to take the place of butter produced from pure, unadulterated milk and cream from the same, contrary to the form of the act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the grand inquest aforesaid upon their oaths and affirmations aforesaid do further present that the said George Schollenberger, late of the said county, yeoman, on the second day of October, in the year of our Lord one thousand eight hundred and ninety-three, at the county aforesaid and within the jurisdiction of this court, did then and there unlawfully have in his possession, with intent to sell as an article of food, a certain substance in imitation of butter, contrary to the form of the act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the grand inquest aforesaid upon their oaths and affirmations aforesaid do further present that the said George Schollenberger, late of the said county, yeoman, on the second day of October, in the year of our Lord one thousand eight hundred and ninety-three, at the county aforesaid and within the jurisdiction of this court, did then and there unlawfully have in his possession, with intent to sell as an article of food, adulterated butter, contrary to the form of the act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

GEORGE S. GRAHAM,
District Attorney.

21 COMMONWEALTH
vs.
GEORGE SCHOLLENBERGER.

List of Witnesses.

1. Evan R. Penrose, deputy collector of internal revenue, P. O. bldg., Philada.
2. E. F. Donnelly, 36 North 16th street, Philada.
3. W. J. Sloan, room 35, 1326 Chestnut " "
4. J. Berry, 606 Lombard St., "
5. Isaac H. Rocap, 107 North 5th St., "
6. James Anderson, room 35, 1326 Chestnut street, "
7. Dr. William Beam, 715 Walnut street, "
8. Dr. Henry Leffmann, 715 Walnut street, "

The following witnesses are retail dealers in oleo. who have bought the article from the defendant. The subpœnas for them should require them to produce all bills and receipts and cancelled

checks issued in payment for oleo. purchased from the defendant in the past two years:

1. John A. Frost, stall 189 Union m'k't, Callowhill & N. 2nd Sts., Philada.
2. George Stewart, 11th-street market, Philada.
3. Samuel Hance, 2445 North 2nd street, "
4. Ellen M. Mason, 751 Passyunk avenue, "
5. Charles Bohme, 1619 Federal street, "

Endorsement: List of witnesses in case of Commonwealth of Pennsylvania *vs.* George Schollenberger. Nov. 13, '93.

22 Endorsement: Witnesses: Evan R. Penrose, P. O. bldg., Philada, Pa.; James Anderson, E. F. Donnelly, W. J. Sloan, A. D. Cassell, 1326 Chestnut St., Philada., Pa.; Dr. Wm. Beam, 715 Walnut St., Phila., Pa.; bail, $500. George Stewart, No. 1703 Lombard St., 7th ward, to October, 1893. District attorney. No. 368, October sessions, 1893. Commonwealth of Pennsylvania *vs.* George Schollenberger, 219 Callowhill St. Selling imitation butter, having the same in possession with intent to sell as an article of food. True bill. C. A. Porter, foreman. Oct. 16, 1893. 11, 16, '93, the defendant, being arraigned, plead not guilty. Dist. att'y sim., *et* issue.

Verdict, —— —, 189–.
Sentence, —. Recognizance of defendant and suret- forfeited.

COMMONWEALTH OF PENNSYLVANIA
vs.
GEORGE SCHOLLENBERGER.

Special Verdict.

The jury find the following facts:

(1.) The defendant, George Schollenberger, is a resident and citizen of the Commonwealth of Pennsylvania and is the duly authorized agent in the city of Philadelphia of The Oakdale Manufacturing Company of Providence, Rhode Island.

(2.) The said Oakdale Manufacturing Company is engaged in the manufacture of oleomargarine in the said city of Providence and State of Rhode Island, and as such manufacturer has complied with all the provisions of the act of Congress of August 2nd, 1886, entitled "An act defining butter; also imposing a tax upon and regulating the manufacture, sale, importation, and ex-
23 portation of oleomargarine."

(3.) The said defendant, as agent aforesaid, is engaged in business at 219 Callowhill street, in the city of Philadelphia, as wholesale dealer in oleomargarine, and was so engaged on the 2nd day of October, 1893, and is not engaged in any other business, either for himself or others.

(4.) The said defendant, on the 1st day of July, 1893, paid to the collector of internal revenue of the first district of Pennsylvania the

sum of four hundred and eighty dollars as and for a special tax upon the business, as agent for the Oakdale Manufacturing Company, in oleomargarine, and obtained from said collector a writing in the words following:

Stamp for $480 per year. No. A 434.	United States internal revenue.	Special tax, $480 per year. No. A 434.

Received from George Schollenberger, agent for the Oakdale Manufacturing Company, the sum of four hundred and eighty dollars for special tax on the business of wholesale dealer in oleomargarine, to be carried on at 219 Callowhill street, Philadelphia, State of Pennsylvania, for the period represented by the coupon or coupons hereto attached.

Dated at Philadelphia, Pa., July first, 1893.

[SEAL.] WILLIAM H. DOYLE,
$480. *Collector, First District of Penna.*

24 The following clauses appear on the margin of the above:

This stamp is simply a receipt for a tax due the Government and does not exempt the holder from any penalty or punishment provided for by the law of any State for carrying on the said business within such State and does not authorize the commencement nor the continuance of such business contrary to the laws of such State or in places prohibited by a municipal law. See section 3243, Revised Statutes U. S.

Severe penalties are imposed for neglect or refusal to place and keep this stamp conspicuously in your establishment or place of business. Act of August 2nd, 1886.

Attached to this were coupons for each month of the year in form as follows:

Coupon for special tax on wholesale dealer in oleomargarine for October, 1893.

(5.) On or before the said second day of October, 1893, the said Oakdale Manufacturing Company shipped to the said defendant, their agent aforesaid, at their place of business in Philadelphia, a package of oleomargarine separate and apart from all other packages, being a tub thereof containing forty pounds, packed, sealed, marked, stamped, and branded in accordance with the requirements of the said act of Congress of August second, 1886. The said package was an original package, as required by said act, and was of such

25 form, size, and weight as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation or merchandise between dealers in the ordinary course of actual commerce, and the said form, size, and weight were adopted in good faith and not for the purpose of evading the laws of the Commonwealth of Pennsylvania, said package being one of a number of similar packages forming one consignment shipped by the said company to the said defendant. Said packages

forming said consignment were unloaded from the cars and placed in defendant's store and then offered for sale as an article of food.

(6.) On the said second day of October, 1893, in the said city of Philadelphia, at the place of business aforesaid, the said defendant, as wholesale dealer aforesaid, sold to James Anderson the said tub or package mentioned in the foregoing paragraph, the oleomargarine therein contained remaining in the original package, being the same package, with seals, marks, stamps, and brands unbroken, in which it was packed by the said manufacturer in the said city of Providence, Rhode Island, and thence transported into the city of Philadelphia and delivered by the carrier to the defendant; and the said tub was not broken nor opened on the said premises of the said defendant, and as soon as it was purchased by the said James Anderson it was removed from the said premises.

(7.) The oleomargarine contained in said tub was manufactured out of an oleaginous substance not produced from unadulterated milk or cream, and was an article designed to take the place of
26 butter, and sold by the defendant to James Anderson as an article of food; but the fact that the article was oleomargarine and not butter was made known by the defendant to the purchaser, and there was no attempt or purpose on the part of the defendant to sell the article as butter or any understanding on the part of the purchaser that he was buying anything but oleomargarine, and the said oleomargarine is recognized by the said act of Congress of August 2nd, 1886, as an article of commerce.

(8.) The above transaction specifically found by the jury is one of many transactions of like character made by the defendant during the last two years.

Endorsement: Commonwealth of Pennsylvania *vs.* George Schollenberger. No. 368. October, 1893. Nov. 16, 1893. Special verdict found by the jury.

Motion for Judgment.

COMMONWEALTH OF PENNSYLVANIA
vs.
GEORGE SCHOLLENBERGER. } 368. Oct., 1893.

Selling imitation butter, having the same in possession with intent to sell as an article of food.

George E. Paul, Oct., 370, 1893. I. Otis Paul, Oct., 372, 1893.

And now, Nov. 16, 1893, comes the district attorney and moves the court for judgment upon the special verdict.

And now, April 18th, 1894, judgment for defendants on special verdict.

J. I. C. H.

27 Endorsement: Commonwealth of Pennsylvania *vs.* George Schollenberger, George E. Paul, and I. Otis Paul. Motions for judgment. Filed Nov. 16, 1893.

October Sessions (1893).

COM.
vs. } (368). True Bill.
GEORGE SCHOLLENBERGER.

Selling imitation butter, having the same in possession with intent to sell as an article of food.

November 16th, 1893—Present: Hon. J. I. Clark Hare. Defendant present, and, being arraigned, pleads not guilty.

District attorney sim., *et* issue.

Same day, defendant present; a jury, being called, answer, appear, and are chosen as follows: Edward Hanley, Michael J. Hayden, Samuel Cress, Thos. Wolf, Frank Rantz, Jno. Hablutzel, Harry Boyer, Samuel Strang, Harry M. White, Jno. Burkmire, A. Stevens, Matthew Haas, who were duly empanelled, sworn, or affirmed, and, being charged by the court, do find that, 1st, the defendant, George Schollenberger, is a resident and citizen of the Commonwealth of Pennsylvania, and is the duly authorized agent in the city of Philadelphia of the Oakdale Manufacturing Company of Providence, Rhode Island; 2nd, the said Oakdale Manufacturing Company is engaged in the manufacturing of oleomargarine in the said city of Providence and State of Rhode Island, and as such manufacturer has complied with all the provisions of the act of
28 Congress of August 2nd, 1886, entitled An act defining butter; also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine.

3rd. The said defendant, as agent aforesaid, is engaged in business at 219 Callowhill St., in the city of Philadelphia, as wholesale dealer in oleomargarine, and was so engaged on the 22nd day of October, 1893, and is not engaged in any other business, either for himself or others.

4th. The said defendant, on the 1st day of July, 1893, paid to the collector of internal revenue of the first district of Pennsylvania the sum of four hundred and eighty dollars as and for a special tax upon the business, as agent for the Oakdale Manufacturing Company, in oleomargarine, and obtained from said collector a writing in the words following:

Stamp for		Special tax,
$480	United States	$480
per year.	internal revenue.	per year.
No. A 434.		No. A 434.

Received from George Schollenberger, agent for the Oakdale Manufacturing Company, the sum of four hundred and eighty dollars for special tax on the business of wholesale dealer in oleomargarine, to be carried on at 219 Callowhill street, Philadelphia, State of Pennsylvania, for the period represented by the coupon or
29 coupons hereto attached.

Dated at Philadelphia, Pa., July 1st, 1893.

[SEAL.] WILLIAM H. DOYLE,
$480. *Collector, First District of Penna.*

The following clauses appear on the margin of the above: This stamp is simply a receipt for a tax due the Government, and does not exempt the holder from any penalty or punishment provided for by the law of any State for carrying on the said business within such State, and does not authorize the commencement nor the continuance of such business contrary to the laws of such State or in places prohibited by a municipal law. See section 3243, Revised Statutes U. S.

Severe penalties are imposed for neglect or refusal to place and keep this stamp conspicuously in your establishment or place of business. Act of August 2nd, 1886. Attached to this were coupons for each month of the year in form as follows:

Coupons for special tax on wholesale dealer in oleomargarine for October, 1893.

(5th.) On or before the said second day of October, 1893, the said Oakdale Manufacturing Company shipped to the said defendant, their agent aforesaid, at their place of business in Philadelphia, a package of oleomargarine, separate and apart from all other packages, being a tub thereof containing forty pounds, packed, sealed, marked, stamped, and branded in accordance with the re-
30 quirements of the said act of Congress of August second, 1886. The said package was an original package, as required by said act, and was of such form, size, and weight as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation or merchandise between dealers in the ordinary course of actual commerce, and the said form, size, and weight were adopted in good faith and not for the purpose of evading the laws of the Commonwealth of Pennsylvania, said package being one of a number of similar packages forming one consignment shipped by the said company to the said defendant. Said package- forming said consignment were unloaded from the cars and placed in defendant's store and then offered for sale as an article of food.

(6th.) On the said second day of October, 1893, in the said city of Philadelphia, at the place of business aforesaid, the said defendant, as wholesale dealer aforesaid, sold to James Anderson the said tub or package mentioned in the foregoing paragraph, the oleomargarine therein contained remaining in the original package, being the same package, with seals, marks, stamps, and brands unbroken, in which it was packed by the said manufacturer in the said city of Providence, Rhode Island, and thence transported into the city of Philadelphia and delivered by the carrier to the defendant, and the said tub was not broken or opened on the said premises of the said defendant, and as soon as it was purchased by the said James Anderson it was removed from the said premises.

31 (7th.) The oleomargarine contained in said tub was manufactured out of an oleoaginous substance not produced from unadulterated milk or cream, and was an article designed to take the place of butter, and sold by the defendant to the said James Ander-

son as an article of food; but the fact that the article was oleomargarine and not butter was made known by the defendant to purchaser, and there was no attempt or purpose on the part of the defendant to sell the article as butter or any understanding on the part of the purchaser that he was buying anything but oleomargarine, and the said oleomargarine is recognized by the said act of Congress of August 2nd, 1886, as an article of commerce.

(8th.) The above transaction specifically found by the jury is one of many transactions of like character made by the defendant during the last two years.

Whereupon the district attorney, on behalf of the Commonwealth, moves the court for judgment upon the verdict in favor of the Commonwealth and against the defendant.

November 27th, 1893—present, Hon. J. I. C. Hare—motion for judgment argued and held under advisement.

April 18th, 1894—present, Hon. J. I. Clark Hare—judgment entered for defendant upon the special verdict.

May 26th, 1894.—Certiorari brought into office.

32 *Assignments of Error.*

Supreme Court for Eastern District, July Term, 1894.

COMMONWEALTH OF PENNSYLVANIA
vs.
GEORGE SCHOLLENBERGER, Defendant Below and Appellee. } No. 104.

Appeal by plaintiff from the judgment of and certiorari to the court of quarter sessions of Philadelphia county, October term, 1893, No. 368.

The Commonwealth in the above case assigns as error:

1. The court erred in entering judgment for the defendant on the special verdict.

2. The court erred in not entering judgment for the plaintiff on the special verdict.

A. MORTON COOPER,
CARROLL R. WILLIAMS,
GEORGE S. GRAHAM,
Per C. R. W., *District Attorney,*
Attorneys for the Commonwealth.

Endorsement: No. 104. July term, 1894, supreme court, eastern district. Commonwealth of Pennsylvania, appellant, *vs.* George Schollenberger. Assignments of error. A. Morton Cooper, Carroll R. Williams; George S. Graham, district attorney, for Commonwealth. Filed January 7, 1895, in supreme court.

33 *Opinion of the Supreme Court of Pennsylvania.*

COMMONWEALTH OF PENNSYLVANIA, Ap't,
vs. } 104.
GEORGE SCHOLLENBERGER.

Appeal from the judgment of the court of quarter sessions of Philadelphia county, July term, 1894.

WILLIAMS, *J.:*

This appeal is from a judgment entered upon a special verdict in the same form as that considered in the opinion just filed in Commonwealth *vs.* J. Otis Paul. The questions raised are the same, and the same judgment must be rendered. The judgment is reversed and judgment is entered in favor of the Commonwealth upon the special verdict. The record is remitted for purposes of sentence and execution.

Endorsement: 104. July term, 1894. Commonwealth of Pennsylvania, ap't, *vs.* George Schollenberger. Appeal from the judgment of the court of quarter sessions of Philadelphia. 17th January, 1895. Reversed. Mem.: To follow Commonwealth of Pennsylvania *vs.* George E. Paul. Filed Oct. 7, 1895, in supreme court.

34 I hereby certify that the above and foregoing is a true and correct copy of the opinion in the above-entitled case, so full and entire as appears of record in our said supreme court.

Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.

In testimony whereof I have hereunto set my hand and seal of said court, at Philadelphia, this twenty-third day of October, A. D. 1895.

CHAS. S. GREENE,
Prothonotary.

35 UNITED STATES OF AMERICA, } *ss:*
State of Pennsylvania, }

I, Charles S. Greene, prothonotary of the supreme court of Pennsylvania, eastern district, do hereby certify that the foregoing record, pages 1 to 34, inclusive, is a true and faithful copy of the record and proceedings of the supreme court of the State of Pennsylvania, eastern district, in a certain suit therein pending, wherein Commonwealth of Pennsylvania was appellant and George Schollenberger was appellee.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said supreme court of the State of Pennsylvania, eastern district, at Philadelphia, the 12th day of November, 1895, and in the one hundred and twentieth year of the Independence of the United States.

Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.

CHAS. S. GREENE,
Prothonotary of the Supreme Court of Pennsylvania, Eastern District.

36 I, James P. Sterrett, chief justice of the supreme court of Pennsylvania, do hereby certify that Charles S. Greene was at the time of signing the annexed attestation and now is prothonotary of the said supreme court of Pennsylvania in and for the eastern district, to whose acts as such full faith and credit are and ought to be given, and that the said attestation is in due form.

In witness whereof I have hereunto subscribed my name this 12th day of November, one thousand eight hundred and ninety-five.

JAMES P. STERRETT,
Chief Justice Sup. Court.

I, Charles S. Greene, prothonotary of the supreme court of Pennsylvania in and for the eastern district, do certify that the Honorable James P. Sterrett, by whom the foregoing certificate was made and given, was at the time of making and giving the same and is now chief justice of the supreme court of Pennsylvania, to whose acts as such full faith and credit are and ought to be given as well in courts of judicature as elsewhere, and that his signature thereto subscribed is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said supreme court of Pennsylvania in and for the eastern district, at Philadelphia, this 12th day of November, one thousand eight hundred and ninety-five.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

CHAS. S. GREENE,
Prothonotary.

37 Supreme Court of U. S., Oct. Term, 1895.

GEORGE SCHOLLENBERGER, Plaintiff in Error,
v.
THE COMMONWEALTH OF PENNSYLVANIA. } No. 811.

Assignments of Error.

1st. The court erred in reversing the judgment of the court of quarter sessions, entered upon the findings of fact of the special jury, and in entering judgment for the Commonwealth of Pennsylvania.

2nd. The court erred in not affirming the judgment of the court of quarter sessions upon the findings of fact of the special verdict.

3rd. The court erred in failing to hold the act of 21st of May, 1885, null and void, in so far as it attempted to prohibit the sale of an article of interstate commerce in the original packages of commerce.

4th. The court erred in holding that the sale by the defendant below was not a sale of an article of interstate commerce in the original package of commerce.

5th. The court erred in assuming that the sale by the defendant below was at retail; the special verdict found that the defendant

below was a wholesale dealer and was not engaged in any other business.

6th. The court erred in apparently holding that, in the absence of any legislation in Pennsylvania with reference to the sale of oleomargarine by retail or by wholesale, a sale by retail would be void, although a sale by wholesale would be valid under the interstate-commerce law.

38 7th. The court erred in assuming that the sale by the defendant below was a sale to a consumer. The facts found by the special verdict were, "the said defendant, as wholesale dealer aforesaid, sold the said tub or package mentioned," without any finding as to the occupation of the purchaser.

8th. The court erred in holding, as it apparently did, that a sale to a consumer of an article of interstate commerce is not protected by art. 1, sec. 8, of the National Constitution, even though such sale was a sale in the original package of commerce.

9th. The court erred in holding that the sale by the defendant below was a sale of "a package devised by a non-resident manufacturer or put up by him, adapted for sale at retail to individual consumers." The findings of fact of the special verdict were that the said package "was of such form, size, and weight as is used by producers or shippers for the purpose of securing both co-venience in handling and security in transportation of merchandize in the ordinary course of actual commerce."

10th. The court erred in holding that the package sold by the defendant below was devised by the manufacturer of such form and size as to evade the laws of the State. The findings of the special verdict were, "the said form, size, and weight were adopted in good faith and not for the purpose of evading the laws of the Commonwealth of Pennsylvania."

A. B. RONEY,
R. C. DALE,
H. R. EDMUNDS,
Counsel for Plaintiff in Error

Endorsed on cover: Case No. 16,101. Pennsylvania supreme court. Term No., 382. George Schollenberger, plaintiff in error, *vs.* The Commonwealth of Pennsylvania. Filed December 5th, 1895.

IN THE SUPREME COURT OF PENNSYLVANIA

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

JULY TERM, 1894.

COMMONWEALTH OF PENNSYLVANIA

vs.

GEORGE SCHOLLENBERGER,
Defendant below and Appellee.

No. 104.

Appeal by plaintiff from the judgment of the Court of Quarter Sessions of Philadelphia County.

I, JAMES P. STERRETT, Chief Justice of the Supreme Court of Pennsylvania at the present time and upon the argument and hearing of the above entitled appeal, do hereby certify :

I. That upon the said argument and hearing the validity of the statute of Pennsylvania of May 21, 1885, was drawn in question by the said defendant George Schollenberger on the ground of its being repugnant to section 8 of Article I of the Constitution of the United States, and that the decision of the said Supreme Court of Pennsylvania was in favor of the validity of the said statute.

II. That upon the said argument and hearing the said defendant George Schollenberger specially set up and claimed the right, privilege and immunity under the said section 8 of Article I of the Constitution of the United States of selling an article of interstate commerce, and that the decision of the said Supreme Court of Pennsylvania was against the said right, privilege and immunity so set up and claimed as aforesaid.

III. That upon the said argument and hearing the said defendant George Schollenberger specially set up and claimed that the said statute of Pennsylvania of May 21, 1885, was null and void under the Constitution of the United States in so far as it attempted to prohibit the sale of an article of interstate commerce in the original packages of commerce, and that the decision of the said Supreme Court of Pennsylvania was against the said claim.

IV. That upon the said argument and hearing the said defendant George Schollenberger specially set up and claimed that the sale of oleomargarine by him for which he was indicted was a sale

of an article of interstate commerce in the original package of commerce and therefore within his rights, privileges and immunities under the Constitution of the United States, and that the decision of the said Supreme Court of Pennsylvania was against the said claim.

In witness whereof, I have hereunto subscribed my name this day of March, one thousand eight hundred and ninety-eight.

March 21, 1898.

JAMES P. STERRETT,
Chief Justice Supreme Court.

I, CHARLES S. GREENE, Prothonotary of the Supreme Court of Pennsylvania in and for the Eastern District, do certify that the Honorable JAMES P. STERRETT, by whom the foregoing certificate was made and given, was at the time of making and giving the same and is now Chief Justice of the Supreme Court of Pennsylvania to whose acts as such full faith and credit are and ought to be given as well in courts of judicature as elsewhere and that his signature thereto subscribed is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court of Pennsylvania in and for the Eastern District, at Philadelphia this twenty-first day of March one thousand eight hundred and ninety-eight.

CHAS. S. GREENE,
Prothonotary.

[SEAL.]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1898.

No. [illegible]

GEORGE A. PAGE, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

FILED DECEMBER 8, 1898.

(16,102.)

(16,102.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 383.

GEORGE E. PAUL, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 29, 1896.

1 *Petition for Writ of Error.*

To the Honorable George Shiras, Jr., associate justice of the Supreme Court of the United States of America:

The petition of George E. Paul respectfully showeth—

That the Commonwealth of Pennsylvania brought suit against your petitioner into the supreme court of Pennsylvania for the eastern district, to July term, 1894, number 105, by an appeal from the judgment of and certiorari to the court of quarter sessions of Philadelphia county, October term, 1893, number 370, in which suit in said supreme court your petitioner was appellee and defendant in said court of quarter sessions and The Commonwealth of Pennsylvania was appellant and plaintiff in said court of quarter sessions.

That your petitioner was criminally indicted by the grand jury of said court of quarter sessions for an alleged violation of a certain act of the General Assembly of the Commonwealth of Pennsylvania of May 21st, 1885, the provisions of which are as follows:

2 "That no person, firm, or corporate body shall manufacture out of any oleaginous substance, or any compound of the same, other than that produced from unadulterated milk or cream from the same, any article designed to take the place of butter or cheese, produced from pure unadulterated milk or cream from the same, or of any imitation or adulterated butter or cheese, nor shall sell or offer for sale or have in his, her, or their possession with intent to sell the same as an article of food."

That violations of the said act are made a misdemeanor, punished by a fine and imprisonment.

That on November 16th, 1893, the defendant pleaded not guilty in said suit, and on the same day a jury being called found a special verdict embodying the following facts:

That the defendant was the duly authorized agent of Braun & Fitts, of Chicago, Illinois, and as such agent was engaged in business in said city of Philadelphia as a wholesale dealer in oleomargarine and was not engaged in any other business, and as such agent had paid the U. S. internal-revenue tax on the business of a wholesale dealer in oleomargarine under act of Congress of August 2nd, 1886.

That on or before the second day of October, 1893, the said Braun & Fitts shipped from Chicago to said defendant a tub
3 of oleomargarine, containing ten pounds, manufactured by the said Braun & Fitts.

That said package was an original package of such form, size, and weight as is used by producers and shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce, and said form, size, and weight were adopted in good faith and not for the purpose of evading the laws of the Commonwealth of Pennsylvania.

That on the said second day of October, in the said city of Philadelphia, at the place of business aforesaid, the said defendant, as wholesale dealer as aforesaid, sold the said tub or package, the oleomargarine therein contained remaining in the original package, being the same package, with seals, marks, stamps, and brands unbroken, in which it was packed by said manufacturer in the said city of Chicago, Illinois, and thence transported into the city of Philadelphia and delivered by the carrier to the defendant, and the said tub was not broken or opened on the said premises, and as soon as it was purchased it was removed from the said premises.

That there was no attempt or purpose on the part of defendant to sell the article as butter or any understanding on the part
4 of the purchaser that he was buying anything but oleomargarine, and the said oleomargarine is recognized by the act of Congress of August 2nd, 1886, as an article of commerce.

That on April 18th, 1894, the said court of quarter sessions entered a judgment upon the record upon the special verdict for defendant.

That on May 26th, 1894, The Commonwealth of Pennsylvania, plaintiff, sued out a writ of error to the said supreme court of the said State.

That on October 7th, 1895, the supreme court of Pennsylvania ordered the said judgment reversed and entered judgment on the said special verdict in favor of the Commonwealth of Pennsylvania, and said judgment was duly entered and recorded in the eastern district of Pennsylvania.

That said judgment of the said supreme court is a judgment of the highest court of record of the Commonwealth of Pennsylvania.

That said judgment of the said court is final.

That the right, title, privilege, and immunity claimed by your petitioner, defendant and appellee aforesaid, were claimed under the Constitution of the United States of America, art. I, sect. 8, providing, among other things, that Congress shall have power "to regulate commerce with foreign nations and among the several States and with the Indian tribes."

That the decision and judgment of the supreme court of Pennsylvania aforesaid was against the right, title, privilege, and immunity so claimed.

5 That said act of the General Assembly of the Commonwealth of Pennsylvania of May 21st, 1885, was and is null and void so far as it attempts to prohibit the sale of an article of commerce in the original package of commerce in the interstate commerce of the States, and therefore the said judgment of the said supreme court is null and void and contrary to the Constitution and statute laws of the United States of America in the premises.

Your petitioner therefore prays for the allowance of a writ of error to the supreme court of Pennsylvania for the eastern district in order that said judgment of the supreme court of Pennsylvania

may be re-examined and reversed or affirmed in the Supreme Court of the United States of America.

And he will ever pray.

GEORGE E. PAUL.

George E. Paul, being duly sworn according to law, deposes and says that the facts set forth in the above petition are true to the best of his knowledge and belief.

GEORGE E. PAUL.

Sworn and subscribed before me this 14th day of October, 1895.

SAMUEL BELL,
Commissioner Circuit Court U. S.,
Eastern District of Pennsylvania.

And now, to wit, October 15th, 1895, citation awarded and writ of error allowed by me. Bond to be given in a penalty of $200.

GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

True copy.

[Seal U. S. Circuit Court, E. D. Pennsylvania.]

SAMUEL BELL,
Clerk C. C. U. S., E. D. of Pa.

5½ [Endorsed:] 105. July term, 1894, S. C. Pa. Commonwealth of Pennsylvania *v.* George E. Paul. Petition for citation. Writ of error. H. R. Edmunds, for petitioner.

6 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the chief justice and associate justices of the supreme court of the Commonwealth of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said Commonwealth in which a decision could be had in the said suit between the Commonwealth of Pennsylvania and George E. Paul, July term, 1894, No. 105, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said Commonwealth, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privileges, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commis-
7

sion, a manifest error hath happened, to the great damage of the said George E. Paul, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, the sixteenth day of October, in the year of our Lord one thousand eight hundred and ninety-five.

Seal U. S. Circuit Court, E. D. Pennsylvania.

SAMUEL BELL,
Clerk Circuit Court United States,
Eastern District of Pennsylvania.

[Endorsed:] Supreme court of Pennsylvania, eastern district, July term, 1894. No. 105. George E. Paul *vs.* Commonwealth of Pennsylvania. Writ of error. Filed Oct. 18, 1895, in supreme court.

8 UNITED STATES OF AMERICA, *ss:*

To the Commonwealth of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden within thirty days at Washington, pursuant to a writ of error filed in the prothonotary's office of the supreme court of Pennsylvania for the eastern district, wherein George E. Paul is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville Weston Fuller, Chief Justice of the Supreme Court of the United States, this eighteenth day of October, 1895.

GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

Service accepted.
GEO. S. GRAHAM, *Dist. Att'y.*

Oct. 29, '95.

8½ [Endorsed:] Supreme court of Pennsylvania. 105. July term, 1894. Commonwealth of Pennsylvania *vs.* George E. Paul. Copy of citation.

9 In the Supreme Court of Pennsylvania in and for the Eastern District of Pennsylvania.

COMMONWEALTH OF PENNSYLVANIA
vs.
GEORGE E. PAUL. } July Term, 1894. No. 105.

Know all men by these presents that we, George E. Paul and Samuel Baillie, are held and firmly bound unto the Commonwealth of Pennsylvania in the full and just sum of two hundred dollars, to be paid to the said The Commonwealth of Pennsylvania, its certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 16th day of October, 1895.

Whereas lately, at a term of the supreme court of Pennsylvania in and for the eastern district of Pennsylvania, in a suit depending in said court between The Commonwealth of Pennsylvania, appellant, and George E. Paul, appellee, judgment was rendered against the said appellee, and the said appellee having obtained a
10 writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The Commonwealth of Pennsylvania, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said George E. Paul, appellant in said Supreme Court of the United States, shall prosecute his writ of error to effect and answer all damages and costs if he fails to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

GEO. E. PAUL. [SEAL.]
SAMUEL BAILLIE. [SEAL.]

Sealed & delivered in the presence of us—
JOHN RODGERS.
HARRY S. FINCH.

I approve of the above bond on behalf of the Commonwealth of Pennsylvania.

GEO. S. GRAHAM,
District Attorney,
Per THOMAS W. BARLOW,
Ass't Dist. Attorney.

The above bond approved Oct. 18, '95.

GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

I hereby certify that the above is a true and correct copy of the bond filed in above-entitled case.

In testimony whereof I have hereunto set my hand and the seal of said court, at Philadelphia, this 23rd day of October, A. D. 1895.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

CHAS. S. GREENE,
Prothonotary.

10½ [Endorsed:] Supreme court of Pennsylvania. 105. July term, 1894. Commonwealth of Pennsylvania. Copy of bond.

11 In the Supreme Court of Pennsylvania in and for the Eastern District.

Among the records and proceedings of the supreme court of Pennsylvania in and for the eastern district the following is thus contained:

Docket Entries.

COMMONWEALTH OF PENNSYLVANIA, Plaintiff, *vs.* GEORGE E. PAUL, Defendant. } No. 105. July Term, 1894.

A. Morton Cooper, Carroll R. Williams, George S. Graham, district attorney. 105.

Appeal of plaintiff from the court of quarter sessions of the county of Philadelphia filed May 26, 1894.

Eo die, certiorari exit, returnable the first Monday of January, 1895.

December 27, 1894—Record returned and filed.

January 7, 1895—Assignments of error filed.

January 18, 1895—Argued.

12 October 7th, 1895—The judgment is reversed and judgment entered in favor of the Commonwealth on the special verdict.

The record is remitted for purposes of sentence and execution.

Opinion by Williams, J.

October 18, 1895—Copy of petition for writ of error to the Supreme Court of the United States brought into office.

Eo die, writ of error brought into office.

Eo die, copy of citation brought into office.

Bond filed.

October 29, 1895—Copy of acceptance and service of citation brought into office.

I hereby certify that the above and foregoing is a true and correct copy of the docket entries in the above-entitled case so full and entire as appears of record in our said supreme court.

Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.

In testimony whereof I have hereunto set my hand and seal of said court, at Philadelphia, this 23rd day of Oct., A. D. 1895.

CHAS. S. GREENE,
Prothonotary.

THE COMMONWEALTH OF PENNSYLVANIA.

Appeal and Affidavit.

In the Supreme Court of Pennsylvania for the Eastern District.

13 (*Appeal and Affidavit.*)

Court of Quarter Sessions of the County of Philadelphia, October Term, 1893.

COMMONWEALTH OF PENNSYLVANIA, Plaintiff, Appellant,
vs.
GEORGE E. PAUL, Defendant, Appellee, } No. 370.

Enter appeal on behalf of the Commonwealth of Pennsylvania from the judgment of the court of quarter sessions of the county of Philadelphia entered in the above case on April 18th, 1894.

A. MORTON COOPER,
CARROLL R. WILLIAMS,
GEORGE S. GRAHAM, *District Attorney,*
Attorneys for Plaintiff.

To Charles S. Greene, proth'y sup. ct., E. D.

COUNTY OF PHILADELPHIA, *ss:*

Eastburn Reeder, being duly affirmed, saith that the above appeal is not intended for delay.

EASTBURN REEDER.

Affirmed and subscribed this 15th day May, A. D. 1894.

CHARLES S. GREENE,
Prothonotary.

Endorsement: No. 105. July term, 1894, supreme court of Pennsylvania, eastern district. Commonwealth, appellant, *v.* George E. Paul. Appeal and affidavit. Filed May 26, 1894, in supreme court. A. Morton Cooper, Carroll R. Williams, George S. Graham, district attorney.

14 *Precipe for Certiorari.*

In the Supreme Court of Pennsylvania for the Eastern District.

COMMONWEALTH OF PENNSYLVANIA, Plaintiff, Appellant, *vs.* GEORGE E. PAUL, Defendant, Appellee.	No. 370. Certiorari to the Court of Quarter Sessions of the County of Philadelphia, of October Term, 1893.

Issue certiorari to the court of quarter sessions of the county of Philadelphia to bring up record and proceedings in a certain action

in said court, No. 370, October term, 1893, wherein Commonwealth of Pennsylvania — plaintiff and George E. Paul is defendant.

Returnable to next term *sec. reg.*

A. MORTON COOPER,
CARROLL R. WILLIAMS,
GEORGE S. GRAHAM, *District Attorney,*
Attorneys for Plaintiff, Appellant.

To Charles S. Greene, proth'y sup. ct., E. D.

Endorsement: No. 105. July term, 1894, supreme court of Pennsylvania, eastern district. Com'th, appellant, *vs.* George E. Paul. Precipe for certiorari. A. Morton Cooper, Carroll R. Williams, George S. Graham, district attorney. Filed May 26, 1894, in supreme court.

15 *Writ of Certiorari.*

EASTERN DISTRICT OF PENNSYLVANIA, } ss:
City and County of Philadelphia, }

The Commonwealth of Pennsylvania to the justices of the court of quarter sessions for the county of Philadelphia, Greeting:

We, being willing for certain causes to be certified of the matter of the appeal of Commonwealth of Pennsylvania from the judgment in No. 370, October sessions, 1893, wherein the said appellant was plaintiff and George E. Paul was defendant—

Judgment entered in the above case on April 18, 1894, before you or some of you depending, do command you that the record and proceedings aforesaid, with all things touching the same, before the justices of our supreme court of Pennsylvania, at a supreme court to be holden at Philadelphia, in and for the eastern district, the first Monday of January next, so full and entire as in our court before you they remain, you certify and send, together with this writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

Witness the Honorable James P. Sterrett, doctor of laws, chief justice of our said supreme court, at Philadelphia, the [SEAL.] twenty-sixth day of May, in the year of our Lord one thousand eight hundred and ninety-four.

CHARLES S. GREENE,
Prothonotary.

16 Endorsement: 370. October sess., 1893. Q. S. Philadelphia. No. 105. July term, 1894, Supreme court. Commonwealth of Pennsylvania, appellant, *vs.* George E. Paul. Certiorari to the court of quarter sessions for the county of Philadelphia, returnable the first Monday of January, 1895. Rule on the appellee to appear and plead on the return day of the writ. Brought into office May 26, 1894. A. Morton Cooper, Carroll R. Williams, George S. Graham, district attorney.

To the honorable the judges of the supreme court of the Commonwealth of Pennsylvania, sitting in and for the eastern district:

The record and process and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

J. I. CLARK HARE. [L. S.]

Filed Dec. 27, 1894, in supreme court.

True Bill.

CITY AND COUNTY OF PHILADELPHIA, *ss:*

In the Court of Quarter Sessions of the Peace for the City and County of Philadelphia, October Sessions, 1893.

The grand inquest of the Commonwealth of Pennsylvania inquiring for the city and county of Philadelphia upon their respective oaths and affirmations do present that George E. Paul, late of the said county, yeoman, on the second day of October, in the year of our Lord one thousand eight hundred and ninety-three, at the county aforesaid and within the jurisdiction of this court, did then and there unlawfully sell as an article of food a certain article manufactured out of some oleaginous substance and compound
17 of the same other than that produced from unadulterated milk and cream from the same, the said article being designed to take the place of butter produced from pure, unadulterated milk and cream from the same, contrary to the from of the act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the grand inquest aforesaid upon their oaths and affirmations aforesaid do further present that the said George E. Paul, late of the said county, yeoman, on the second day of October, in the year of our Lord one thousand eight hundred and ninety-three, at the county aforesaid and within the jurisdiction of this court, did then and there unlawfully sell as an article of food a certain substance in imitation of butter, contrary to the form of the act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the grand inquest aforesaid upon their respectice oaths and affirmations aforesaid do further present that the said George E. Paul, late of the said county, yeoman, on the second day of October, in the year of our Lord one thousand eight hundred and ninety-three, at the county aforesaid and within the jurisdiction of this court, did then and there unlawfully sell an article of food, adulterated butter, contrary to the form of the act of the General
18 Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the grand inquest aforesaid upon their oaths and affirmations aforesaid do further present that the said George E. Paul, late

of the said county, yeoman, on the second day of October, in the year of our Lord one thousand eight hundred and ninety-three, at the county aforesaid and within the jurisdiction of this court, did then and there unlawfully offer for sale as an article of food a certain article manufactured out of some oleaginous substance and compound of the same other than that produced from unadulterated milk and cream from the same, the said article being designed to take the place of butter produced from pure, unadulterated milk and cream from the same, contrary to the form of the act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the grand inquest aforesaid upon their oaths and affirmations aforesaid do further present that the said George E. Paul, late of the said county, yeoman, on the second day of October, in the year of our Lord one thousand eight hundred and ninety-three, at the county aforesaid and within the jurisdiction of this court, did then and there unlawfully offer for sale as an article of food a certain article in imitation of butter, contrary to the form of the act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the grand inquest aforesaid upon their oaths and affirmations aforesaid do further present that the said George E. Paul, late of the said county, yeoman, on the second day of October, in the year of our Lord one thousand eight hundred and ninety-three, at the county aforesaid and within the jurisdiction of this court, did then and there unlawfully offer for sale as an article of food adulterated butter, contrary to the form of the act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the grand inquest aforesaid upon their respective oaths and affirmations aforesaid do further present that the said George E. Paul, late of the said county, yeoman, on the second day of October, in the year of our Lord one thousand eight hundred and ninety-three, at the county aforesaid and within the jurisdiction of this court, did then and there have in his possession, with intent to sell as an article of food, a certain article manufactured out of some oleaginous substance and compound of the same other than that produced from unadulterated milk and cream from the same, the said article being designed to take the place of butter produced from pure, unadulterated milk and cream from the same, contrary to the form of the act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the grand inquest aforesaid upon their oaths and affirmations do further present that the said George E. Paul, late of the said county, yeoman, on the second day of October, in the year of our Lord one thousand eight hundred and ninety-three, at the county aforesaid and within the jurisdiction of this court, did then and there unlawfully have in his possession, with intent to sell as an article of food, a certain substance in imitation of butter, con-

trary to the form of the act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the grand inquest aforesaid upon their oaths and affirmations aforesaid do further present that the said George E. Paul, late of the said county, yeoman, on the second day of October,
21 in the year of our Lord one thousand eight hundred and ninety-three, at the county aforesaid and within the jurisdiction of this court, did then and there unlawfully have in his possession, with intent to sell as an article of food, adulterated butter, contrary to the form of the act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

GEORGE S. GRAHAM,
District Attorney.

Endorsement: Witnesses: Evan R. Penrose, P. O. bldg., Phila., Pa.; Jas. E. Crawford, E. F. Donnelly, Maggie Donnelly, W. J. Sloan, A. K. Cassel, 1326 Chestnut street, Phila Pa.; Dr. William Beam, Dr. Henry Leffmann, 715 Walnut St., Phila., Pa. 10, 1893, bail, $500, to October term, '93. J. Otis Paul, No. 451 York Ave., 12th ward. District attorney. 11, 3, 1893, recognizance of defendant and surety forfeited. No. 370, October sessions, 1893. Commonwealth *vs.* George E. Paul, 214 Callowhill St. Selling imitation butter, having the same in possession with intent to sell as an article of food. True bill. C. A. Porter, foreman. Oct. 16, 1893. 11, 16, '93, the defendant, being arraigned, plead not guilty. Dist. att'y *sim. et* issue.

Verdict, —— —, 189–.
Sentence, —.

COMMONWEALTH OF PENNSYLVANIA
vs.
GEORGE E. PAUL.

Special Verdict.

The jury find the following facts:

(1.) The defendant, George E. Paul, is a resident and citi-
22 zen of the Commonwealth of Pennsylvania and is the duly authorized agent in the city of Philadelphia of Braun and Fitts, of Chicago, Illinois.

(2.) The said Braun and Fitts are engaged in the manufacture of oleomargarine in the said city of Chicago and State of Illinois, and as such manufacturers have complied with all the provisions of the act of Congress of August 2nd, 1886, entitled "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine."

(3.) The said defendant as agent aforesaid is engaged in business at 214 Callowhill street, in the city of Philadelphia, as wholesale

dealer in oleomargarine, and was so engaged on the second day of October, 1893.

(4.) The said defendant, on the first day of July, 1893, paid to the collector of internal revenue of the first district of Pennsylvania the sum of four hundred and eighty dollars as and for a special tax upon the business as agent for Braun and Fitts Company in oleomargarine, and obtained from said collector a writing in the words following:

Stamp for $480 per year. No. A 431.	United States internal revenue.	Special tax, $480 per year. No. *a* 431.

Received from J. Otis Paul & George E. Paul, agents for the Chicago Butterine Co., the sum of four hundred and eighty
23 dollars for special tax on the business of wholesale dealer in oleomargarine, to be carried on at No. 214 Callowhill street, Philadelphia, State of Pennsylvania, for the period represented by the coupon or coupons hereto attached.

Dated at Philadelphia, Pa., July 1st, 1893.

[SEAL.] WILLIAM H. DOYLE,
$480. *Collector, First District of Pennsylvania.*

The following clauses appear on the margin of the above:

This stamp is simply a receipt for a tax due the Government and does not exempt the holder from any penalty or punishment provided for by the law of any State for carrying on the said bnsiness within such State and does not authorize the commencement nor the continuance of such business contrary to the laws of such State or in places prohibited by a municipal law. See section 3243, Revised Statutes U. S.

Severe penalties are imposed for neglect or refusal to place and keep this stamp conspicuously in your establishment or place of business. Act of August 2nd, 1886.

Attached to this were coupons for each month of the year in form as follows:

Coupon for special tax on wholesale dealer in oleomargarine for October, 1893.

(5.) On or before the said second day of October, 1893, the
24 said Braun & Fitts shipped to the said defendant, their agent aforesaid at their place of business in Philadelphia, a package of oleomargarine separate and apart from all other packages, being a tub thereof, containing ten pounds, packed, sealed, marked, stamped, and branded in accordance with the requirements of the said act of Congress of August second, 1886. The said package was an original package, as required by the said act, and was of such form, size, and weight as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce, and the said form, size, and weight were

adopted in good faith and not for the purpose of evading the laws of the Commonwealth of Pennsylvania, said package being one of a number of similar packages forming one consignment shipped by the said company to the said defendant. Said packages forming said consignment were unloaded from the cars and placed in defendant's store and there offered for sale as an article of food.

(6.) On the said second day of October, 1893, in the said city of Philadelphia, at the place of business aforesaid, the said defendant, as wholesale dealer aforesaid, sold to James E. Crawford the said tub or package mentioned in the foregoing paragraph, the oleomargarine therein contained remaining in the original package, being the same package, with seals, marks, stamps, and brands unbroken, in which it was packed by the said manufacturer in the said city of Chicago, Illinois, and thence transported into the
25 city of Philadelphia and delivered by the carrier to the defendant; and the said tub was not broken nor opened on the said premises of the said defendant, and as soon as it was purchased by the said James E. Crawford it was removed from the said premises.

(7.) The oleomargarine contained in said tub was manufactured out of an oleaginous substance not produced from unadulterated milk or cream and was an article designed to take the place of butter, and sold by the defendant to James E. Crawford as an article of food, but the fact that the article was oleomargarine and not butter was made known by the defendant to the purchaser and there was no attempt or purpose on the part of the defendant to sell the article as butter or any understanding on the part of the purchaser that he was buying anything but oleomargarine, and the said oleomargarine is recognized by the said act of Congress of August 2nd, 1886, as an article of commerce.

(8.) The above transaction specifically found by the jury is one of many transactions of like character made by the defendant during the last two years.

Endorsement: Court of quarter sessions, 1893. No. 370. Commonwealth *vs.* George E. Paul. Special verdict. November 16, 1893. Special verdict of jury finding the facts as within stated.

October Sessions, 1893.

COM. *vs.* GEORGE E. PAUL. } 370. Selling Imitation Butter. True Bill.

26 Having the same in possession with intent to sell as an article of food.

November 16th, 1893.—Present: Hon. J. I. Clark Hare; defendant present, and, being arraigned, pleads not guilty.

District attorney *sim et* issue.

Same day, defendant present is put upon trial. A jury, being called, answer, appear, and are chosen as follows: Edward Hanley,

Michael J. Hayden, Samuel Cress, Thos. Wolf, Frank Rantz, Jno. Hablutzel, Harry Boyer, Samuel Strang, Harry M. White, Jno. Burkmire, A. Stevens, Matthew Haas, who were all duly empanelled, sworn, or affirmed, and, being charged by the court, do find that—

(1.) The defendant, George E. Paul, is a resident and citizen of the Commonwealth of Pennsylvania, and is the duly authorized agent in the city of Philadelphia of Braun and Fitts, of Chicago, Illinois.

(2.) The said Braun and Fitts are engaged in the manufacture of oleomargarine in the said city of Chicago and State of Illinois, and as such manufacturers have complied with all the provisions of the act of Congress of August 2nd, 1886, entitled "An act defining butter; also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine."

(3.) The said defendant, as agent aforesaid, is engaged in business at No. 214 Callowhill street, in the city of Philadelphia, as wholesale dealer in oleomargarine, and was so engaged on the second day of October, 1893.

(4.) The said defendant, on the first day of July, 1893, paid
27 to the collector of internal revenue of the first district of Pennsylvania the sum of four hundred and eighty dollars as and for a special tax upon the business as agent for Braun & Fitts Company in oleomargarine, and obtained from said collector a writing in the words following:

Stamp for $480 per year. No. A. 431.	United States internal revenue.	Special tax, $480 per year. No. A. 431.

Received from J. Otis Paul & George E. Paul, agents for the Chicago Butterine Co., the sum of four hundred and eighty dollars for special tax on the business of wholesale dealer in oleomargarine, to be carried on at No. 214 Callowhill street, Philadelphia, State of Pennsylvania, for the period represented by the coupon or coupons hereto attached.

Dated at Philadelphia, Pa., July 1st, 1893.

[SEAL.] WILLIAM H. DOYLE,
$480. *Collector, First District of Pennsylvania.*

The following clauses appear on the margin of the above: This stamp is simply a receipt for a tax due the Government, and does not exempt the holder from any penalty or punishment provided for by the law of any State for carrying on the said business within such State, and does not authorize the commencement nor the continuance of such business contrary to the laws of such State or places prohibited by a municipal law. See section 3243, Revised
Statutes U. S. Severe penalties are imposed for neglect or
28 refusal to place and keep this stamp conspicuously in your establishment or place of business. Act of August 2nd, 1886.

Attached to this were coupons for each month of the year in form as follows: Coupon for special tax on wholesale dealer in oleomargarine for October, 1893.

(5.) On or before the said second day of October, 1893, the said Braun & Fitts shipped to the said defendant, their agent aforesaid, at their place of business in Philadelphia, a package of oleomargarine, separate and apart from all other packages, being a tub thereof, containing ten pounds, packed, sealed, marked, stamped, and branded in accordance with the requirements of the said act of Congress of August second, 1886. The said package was an original package as required by said act, and was of such form, size, and weight as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in ordinary course of actual commerce, and said form, size, and weight were adopted in good faith and not for the purpose of evading the laws of the Commonwealth of Pennsylvania, the said package being one of a number of similar packages forming one consignment shipped by the said company to the said defendant. Said packages forming said consignment were unloaded from the cars and placed in defendant's store and there offered for sale as an article of food.

(6.) On the said second day of October, 1893, in the said city of Philadelphia, at the place of business aforesaid, the said
29 defendant, as wholesale dealer aforesaid, sold to James E. Crawford the said tub or package mentioned in the foregoing paragraph, the oleomargarine therein contained remaining in the original package being the same package, with seals, marks, stamps, and brands unbroken in which it was packed by the said manufacturer in the said city of Chicago, Illinois, and thence transported into the city of Philadelphia and delivered by the carrier to the defendant, and the said tub was not broken nor opened on the said premises of the said defendant, and as soon as it was purchased by the said James E. Crawford it was removed from the said premises.

(7.) The oleomargarine contained in said tub was manufactured out of an oleomargarine substance not produced from unadulterated milk or cream, and was an article designed to take the place of butter and sold by the defendant to James E. Crawford as an article of food; but the fact that the article was oleomargarine and not butter was made known by the defendant to the purchaser and there was no attempt or purpose on the part of the defendant to sell the article as butter or any understanding on the part of the purchaser that he was buying anything but oleomargarine, and the said oleomargarine is recognized by the said act of Congress of August 2nd, 1886, as an article of commerce.

(8.) The above transaction specifically found by the jury is one of many transactions of like character made by the defendant during the last two years.

30 Whereupon the district attorney, on behalf of the Commonwealth, moves the court for judgment upon the verdict in favor of the Commonwealth and against the defendant.

November 27th, 1893—present, Hon. J. I. C. Hare—motion for judgment argued and held under advisement.

April 18th, 1894—present, Hon. J. I. Clark Hare—judgment entered for the defendant upon the special verdict.

May 26th, 1894, certiorari brought into office.

Assignments of Error.

Supreme Court for Eastern District, July Term, 1894.

COMMONWEALTH OF PENNSYLVANIA, Appellant, *vs.* GEORGE E. PAUL, Defendant Below and Appellee. } No. 105.

Appeal by plaintiff from the judgment of and certiorari to the court of quarter sessions of Philadelphia county, October term, 1893, No. 370.

The Commonwealth in the above case assigns as error:

1. The court erred in entering judgment for the defendant on the special verdict.

2. The court erred in not entering judgment for the plaintiff on the special verdict.

A. MORTON COOPER,
CARROLL R. WILLIAMS,
GEO. S. GRAHAM,
Per C. R. W., *District Attorney,*
Attorneys for Commonwealth.

31 Endorsement: No. 105. July term, 1894. Supreme court, eastern district. Com. of Penna., appellant, *vs.* Geo. E. Paul. Assignments of error. A. Morton Cooper, Carroll R. Williams. Geo. S. Graham, dist. att'y, for Commonwealth. Filed Jan. 7, 1895, in supreme court.

Opinion of the Supreme Court of Pennsylvania.

COMMONWEALTH, App't, *vs.* GEORGE E. PAUL. } Appeal from the Judgment of the Court of Quarter Sessions of the Peace of Phila. County. 105. July Term, 1894.

WILLIAMS, *J.:*

The questions raised in this case are identical with those just disposed of in Commonwealth *vs.* J. Otis Paul, in which an opinion is this day filed.

For reasons there stated, the judgment is reversed and judgment entered in favor of the Commonwealth on the special verdict.

The record is remitted for purposes of sentence and execution.

Endorsement: 105. July term, 1894. Commonwealth, app't, *v.* George E. Paul. Appeal from the judgment of the quarter sessions of Phila. county. 17 Jan'y, '95. Rev'd. Mem.: To follow Com'th *v.* J. O. Paul. Filed Oct. 7th, 1895, in supreme court. Williams.

I hereby certify that the above and foregoing is a true and correct copy of the opinion in the above-entitled case, so full and entire as appears of record in our said supreme court.

Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.

32 In testimony whereof I have hereunto set my hand and seal of said court, at Philadelphia, this twenty-third day of October, A. D. 1895.

CHAS. S. GREENE,
Prothonotary.

33 UNITED STATES OF AMERICA, }
State of Pennsylvania, } *ss:*

I, Charles S. Greene, prothonotary of the supreme court of Pennsylvania, eastern district, do hereby certify that the foregoing record, pages 1 to 32, inclusive, is a true and faithful copy of the record and proceedings of the supreme court of the State of Pennsylvania, eastern district, in a certain suit therein pending wherein Commonwealth of Pennsylvania was appellant and George E. Paul was appellee.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said supreme court of the State of Pennsylvania, eastern district, at Philadelphia, the 12th day of November, 1895, and in the one hundred and twentieth year of the Independence of the United States.

Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.

CHAS. S. GREENE,
Prothonotary of the Supreme Court of Pennsylvania, Eastern District.

34 I, James P. Sterrett, chief justice of the supreme court of Pennsylvania, do hereby certify that Charles S. Greene was at the time of signing the annexed attestation and now is prothonotary of the said supreme court of Pennsylvania in and for the eastern district, to whose acts as such full faith and credit are and ought to be given, and that the said attestation is in due form.

In witness whereof I have hereunto subscribed my name this 12th day of November, one thousand eight hundred and ninety-five.

JAMES P. STERRETT,
Chief Justice Sup. Court.

I, Charles S. Greene, prothonotary of the supreme court of Pennsylvania in and for the eastern district, do certify that the Honorable James P. Sterrett, by whom the foregoing certificate was made and given, was at the time of making and giving the same and is now chief justice of the supreme court of Pennsylvania, to whose acts as such full faith and credit are and ought to be given as well in courts of judicature as elsewhere, and that his signature thereto subscribed is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said supreme court of Pennsylvania in and for the eastern district, at Philadelphia, this 12th day of November, one thousand eight hundred and ninety-five.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

CHAS. S. GREENE,
Prothonotary.

35 Supreme Court of U. S., Oct. Term, 1895.

GEORGE E. PAUL, Plaintiff in Error,
v.
THE COMMONWEALTH OF PENNSYLVANIA. } No. 812.

Assignments of Error.

1st. The court erred in reversing the judgment of the court of quarter sessions entered upon the findings of fact of the special jury and in entering judgment for the Commonwealth of Pennsylvania.

2nd. The court erred in not affirming the judgment of the court of quarter sessions upon the findings of fact of the special verdict.

3rd. The court erred in failing to hold the act of 21st of May, 1885, null and void, in so far as it attempted to prohibit the sale of an article of interstate commerce in the original package of commerce.

4th. The court erred in holding that the sale by the defendant below was not a sale of an article of interstate commerce in the original package of commerce.

5th. The court erred in assuming that the sale by the defendant below was at retail; the special verdict found that the defendant below was a wholesale dealer.

6th. The court erred in apparently holding that, in the absence of any legislation in Pennsylvania with reference to the sale of oleomargarine by retail or by wholesale, a sale by retail would be void, although a sale by wholesale would be valid under the interstate-commerce law.

36 7th. The court erred in assuming that the sale by the defendant below was a sale to a consumer. The facts found by the special verdict were, "the said defendant, as wholesale dealer aforesaid, sold the said tub or package mentioned," without any finding as to the occupation of the purchaser.

8th. The court erred in holding, as it apparently did, that a sale to a consumer of an article of interstate commerce is not protected by art. 1, sec. 8, of the National Constitution, even though such sale was a sale in the original package of commerce.

9th. The court erred in holding that the sale by the defendant below was a sale of "a package devised by a non-resident manufacturer or put up by him adapted for sale at retail to individual consumers." The findings of fact of the special verdict were the said package "was of such form, size, and weight as is used by

producers or shippers for the purpose of securing both conv-ience in handling and security in transportation of merchandize in the ordinary course of actual commerce."

10th. The court erred in holding that the package sold by the defendant below was devised by the manufacturer of such form and size as to evade the laws of the State. The findings of the special verdict were, "the said form, size, and weight were adopted in good faith and not for the purpose of evading the laws of the Commonwealth of Pennsylvania."

A. B. RONEY,
R. C. DALE,
H. R. EDMUNDS,
Counsel for Plaintiff in Error.

Endorsed on cover: Case No. 16,102. Pennsylvania supreme court. Term No., 383. George E. Paul, plaintiff in error, *vs.* The Commonwealth of Pennsylvania. Filed December 5th, 1895.

IN THE SUPREME COURT OF PENNSYLVANIA

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

JULY TERM, 1894.

COMMONWEALTH OF PENNSYLVANIA vs. GEORGE E. PAUL, Defendant below and Appellee.	No. 105.

Appeal by plaintiff from the judgment of the Court of Quarter Sessions of Philadelphia County.

I, JAMES P. STERRETT, Chief Justice of the Supreme Court of Pennsylvania at the present time and upon the argument and hearing of the above entitled appeal, do hereby certify:

I. That upon the said argument and hearing the validity of the statute of Pennsylvania of May 21, 1885, was drawn in question by the said defendant George E. Paul on the ground of its being repugnant to section 8 of Article I of the Constitution of the United States, and that the decision of the said Supreme Court of Pennsylvania was in favor of the validity of the said statute.

II. That upon the said argument and hearing the said defendant George E. Paul specially set up and claimed the right, privilege and immunity under the said section 8 of Article I of the Constitution of the United States of selling an article of interstate commerce, and that the decision of the said Supreme Court of Pennsylvania was against the said right, privilege and immunity so set up and claimed as aforesaid.

III. That upon the said argument and hearing the said defendant George E. Paul specially set up and claimed that the said statute of Pennsylvania of May 21, 1885, was null and void under the Constitution of the United States in so far as it attempted to prohibit the sale of an article of interstate commerce in the original packages of commerce, and that the decision of the said Supreme Court of Pennsylvania was against the said claim.

IV. That upon the said argument and hearing, the said defendant George E. Paul specially set up and claimed that the sale of oleomargarine by him for which he was indicted was a sale of an article of interstate commerce in the original package of commerce and therefore within his rights, privileges and immunites under the Constitution of the United States, and that the decision of the said Supreme Court of Pennsylvania was against the said claim.

In witness whereof, I have hereunto subscribed my name this day of March, one thousand eight hundred and ninety-eight.

JAMES P. STERRETT,
Chief Justice Supreme Court.

March 21, 1898.

I, CHARLES S. GREENE, Prothonotary of the Supreme Court of Pennsylvania in and for the Eastern District, do certify that the Honorable JAMES P. STERRETT, by whom the foregoing certificate was made and given, was at the time of making and giving the same and is now Chief Justice of the Supreme Court of Pennsylvania to whose acts as such full faith and credit are and ought to be given as well in courts of judicature as elsewhere and that his signature thereto subscribed is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court of Pennsylvania in and for the Eastern District, at Philadelphia this twenty-first day of March one thousand eight hundred and ninety-eight.

CHAS. S. GREENE,
Prothonotary.

[SEAL.]

6939

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 98.

J. OTIS PAUL, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

FILED DECEMBER 5, 1895.

(16,103.)

(16,103.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 384.

J. OTIS PAUL, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 29, 1896.

1 *Petition for Writ of Error.*

To the Honorable George Shiras, Jr., associate justice of the Supreme Court of the United States of America:

The petition of J. Otis Paul respectfully showeth—

That the Commonwealth of Pennsylvania brought suit against your petitioner into the supreme court of Pennsylvania for the eastern district, to July term, 1894, number 106, by an appeal from the judgment of and certiorari to the court of quarter sessions of Philadelphia county, October term, 1893, number 372, in which suit in said supreme court your petitioner was appellee and defendant in said court of quarter sessions and The Commonwealth of Pennsylvania was appellant and plaintiff in said court of quarter sessions.

That your petitioner was criminally indicted by the grand jury of said court of quarter sessions for an alleged violation of a certain act of the General Assembly of the Commonwealth of Pennsylvania of May 21st, 1885, the provisions of which are as follows:

2 "That no person, firm, or corporate body shall manufacture out of any oleaginous substance or any compound of the same, other than that produced from unadulterated milk or cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk, or cream from the same, or of any imitation or adulterated butter or cheese, nor shall sell or offer for sale or have in his, her, or their possession with intent to sell the same as an article of food."

That violations of the said act are made a misdemeanor, punished by a fine and imprisonment.

That on November 16th, 1893, the defendant pleaded not guilty in said suit, and on the same day a jury being called found a special verdict embodying the following facts:

That the defendant was the duly authorized agent of Braun & Fitts, of Chicago, Illinois, and as such agent was engaged in business in said city of Philadelphia as a wholesale dealer in oleomargarine and was not engaged in any other business, and as such agent had paid the U. S. internal-revenue tax on the business of a wholesale dealer in oleomargarine under act of Congress of August 2nd, 1886.

That on or before the second day of October, 1893, the — Braun & Fitts shipped from Chicago to said defendant a tub of
3 oleomargarine, containing ten pounds, manufactured by the said Braun & Fitts.

That said package was an original package of such form, size, and weight as is used by producers and shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce, and said form, size, and weight were adopted in good faith and not for the purpose of evading the laws of the Commonwealth of Pennsylvania.

That on the said second day of October, in the said city of Philadelphia, at the place of business aforesaid, the said defendant, as wholesale dealer as aforesaid, sold the said tub or package, the oleomargarine therein contained remaining in the original package, being the same package, with seals, marks, stamps, and brands unbroken, in which it was packed by said manufacturer in the said city of Chicago, Illinois, and thence transported into the city of Philadelphia and delivered by the carrier to the defendant, and the said tub was not broken or opened on the said premises, and as soon as it was purchased it was removed from the said premises.

That there was no attempt or purpose on the part of defendant to sell the article as butter or any understanding on the part
4 of the purchaser that he was buying anything but oleomargarine, and the said oleomargarine is recognized by the act of Congress of August 2nd, 1886, as an article of commerce.

That on April 18th, 1894, the said court of quarter sessions entered a judgment upon the record upon the special verdict for defendant.

That on May 26th, 1894, The Commonwealth of Pennsylvania, plaintiff, sued out a writ of error to the said supreme court of the said State.

That on October 7th, 1895, the supreme court of Pennsylvania ordered the said judgment reversed and entered judgment on the said special verdict in favor of the Commonwealth of Pennsylvania, and said judgment was duly entered and recorded in the eastern district of Pennsylvania.

That said judgment of the said supreme court is a judgment of the highest court of record of the Commonwealth of Pennsylvania.

That said judgment of the said court is final.

That the right, title, privilege, and immunity claimed by your petitioner, defendant and appellee aforesaid, were claimed under the Constitution of the United States of America, art. I, sect. 8, providing, among other things, that Congress shall have power "to regulate commerce with foreign nations and among the several States and with the Indian tribes."

That the decision and judgment of the supreme court of Pennsylvania aforesaid was against the right, title, privilege, and immunity so claimed.

5 That said act of the General Assembly of the Commonwealth of Pennsylvania of May 21st, 1885, was and is null and void so far as it attempts to prohibit the sale of an article of commerce in the original package of commerce in the interstate commerce of the States, and therefore the said judgment of the said supreme court is null and void and contrary to the Constitution and statute laws of the United States of America in the premises.

Your petitioner therefore prays for the allowance of a writ of error to the supreme court of Pennsylvania for the eastern district in order that said judgment of the supreme court of Pennsylvania may be re-examined and reversed or affirmed in the Supreme Court of the United States of America.

And he will ever pray. J. OTIS PAUL.

J. Otis Paul, being duly sworn according to law, deposes and says that the facts set forth in the above petition are true to the best of his knowledge and belief.

J. OTIS PAUL.

Sworn and subscribed before me this 14th day of October, 1895.

SAMUEL BELL,
Commissioner Circuit Court U. S.,
Eastern District of Pennsylvania.

And now, to wit, October 15th, 1895, citation awarded and writ of error allowed by me; bond to be given in a penalty of $200.

GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

True copy.

[Seal U. S. Circuit Court, E. D. Pennsylvania.]

SAMUEL BELL,
Clerk C. C. U. S., E. D. of Pa.

5½ [Endorsed:] 106. July term, 1894, S. C. Pa. Common'th of Pennsylvania *v.* J. Otis Paul. Petition for citation. Writ of error. H. R. Edmunds, for petitioner.

6 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the chief justice and associate justices of the supreme court of the Commonwealth of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said Commonwealth in which a decision could be had in the said suit between the Commonwealth of Pennsylvania and J. Otis Paul, July term, 1894, No. 106, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said Commonwealth, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privileges, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said J. Otis Paul, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal,

7

distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, the sixteenth day of October, in the year of our Lord one thousand eight hundred and ninety-five.

Seal U. S. Circuit Court, E. D. Pennsylvania.

SAMUEL BELL,
Clerk Circuit Court United States,
Eastern District of Pennsylvania.

7½ [Endorsed:] Supreme court of Pennsylvania, eastern district, July term, 1894. No. 106. J. Otis Paul *vs.* Commonwealth of Pennsylvania. Writ of error. Filed Oct. 18, 1895, in supreme court.

8 UNITED STATES OF AMERICA, *ss:*

To the Commonwealth of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden within thirty days, at Washington, pursuant to a writ of error filed in the prothonotary's office of the supreme court of Pennsylvania for the eastern district, wherein J. Otis Paul is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville Weston Fuller, Chief Justice of the Supreme Court of the United States, this eighteenth day of October, 1895.

GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

Service accepted.
GEO. S. GRAHAM, *Dist. Att'y.*

Oct. 29, '95.

8½ [Endorsed:] Supreme court of Pennsylvania. 106. July term, 1894. Commonwealth of Pennsylvania. Copy of citation.

9 In the Supreme Court of Pennsylvania in and for the Eastern District of Pennsylvania.

COMMONWEALTH OF PENNSYLVANIA
vs.
J. OTIS PAUL. } July Term, 1894. No. 106.

Know all men by these presents that we, J. Otis Paul and Samuel Bailie, are held and firmly bound unto the Commonwealth of Pennsylvania in the full and just sum of two hundred dollars, to be paid to the said The Commonwealth of Pennsylvania, its certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 16th day of October, 1895.

Whereas lately, at a term of the supreme court of Pennsylvania in and for the eastern district of Pennsylvania, in a suit depending in said court between The Commonwealth of Pennsylvania, appellant, and J. Otis Paul, appellee, judgment was rendered against the said appellee, and the said appellee having obtained a
10 writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The Commonwealth of Pennsylvania, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said J. Otis Paul, appellant in said Supreme Court of the United States, shall prosecute his writ of error to effect and answer all damages and costs if he fails to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

J. OTIS PAUL. [SEAL.]
SAMUEL BAILIE. [SEAL.]

Sealed & delivered in the presence of us—
JOHN RODGERS.
HARRY S. FINCH.

I approve of the above bond on behalf of the Commonwealth of Pennsylvania.

GEO. S. GRAHAM,
District Attorney,
Per THOMAS W. BARLOW,
Ass't Dist. Att'y.

The above bond approved Oct. 18, '95.

GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the U. States.

I hereby certify that the above is a true and correct copy of the bond filed in above-entitled case.

In testimony whereof I have hereunto set my hand and the seal of said court, at Philadelphia, this 23rd day of October, A. D. 1895.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

CHAS. S. GREENE,
Prothonotary.

10½ [Endorsed:] Supreme court of Pennsylvania. 106. July term, 1894. Commonwealth of Pennsylvania *vs.* J. Otis Paul. Copy of bond.

11 In the Supreme Court of Pennsylvania in and for the Eastern District.

Among the records and proceedings of the supreme court of Pennsylvania in and for the eastern district the following is thus contained:

Docket Entries.

COMMONWEALTH OF PENNSYLVANIA, Plaintiff, *vs.* J. OTIS PAUL, Defendant.	No. 106. July Term, 1894.

A. Morton Cooper, Carroll R. Williams; George S. Graham, district attorney. 106.

Appeal of plaintiff from the court of quarter sessions of the county of Philadelphia filed May 26, 1894.

Eo die, certiorari exit, returnable the first Monday of January, 1895.

December 27, 1894—Record returned and filed.

January 7, 1895—Assignments of error filed.

January 18th, 1895—Argued.

October 7, 1895—The judgment is reversed and judgment is now entered on the special verdict in favor of the Commonwealth. The record is remitted that sentence may be imposed according to law. Opinion by Williams, J.

12 October 18, 1895—Copy of petition for writ of error to the Supreme Court of the United States brought into office.

Eo die, writ of error brought into office.

Eo die, copy of citation brought into office.

Bond filed.

October 29, 1895—Copy of acceptance of service of citation brought into office.

I hereby certify that the above and foregoing is a true and correct copy of the docket entries in the above-entitled case so full and entire as appears of record in our said supreme court.

Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.

In testimony whereof I have hereunto set my hand and seal of said court, at Philadelphia, this 23rd day of October, A. D. 1895.

CHAS. S. GREENE,
Prothonotary.

Appeal and Affidavit.

In the Supreme Court of Pennsylvania for the Eastern District.

Court of Quarter Sessions of the County of Philadelphia, October Term, 1893.

COMMONWEALTH OF PENNSYLVANIA, Plaintiff, Appellant,
vs.
J. OTIS PAUL, Defendant, Appellee. } No. 372.

13 Enter appeal on behalf of the Commonwealth of Pennsylvania from the judgment of the court of quarter sessions of the county of Philadelphia entered in the above case April 18th, 1894.

A. MORTON COOPER,
CARROLL R. WILLIAMS,
GEORGE S. GRAHAM, *District Attorney,*
Attorneys for Plaintiff.

To Charles S. Greene, proth'y sup. ct., E. D.

COUNTY OF PHILADELPHIA, *ss:*

Eastburn Reeder, being duly affirmed, saith that the above appeal is not intended for delay.

EASTBURN REEDER.

Affirmed and subscribed this 15th day of May, A. D. 1894.

CHARLES S. GREENE,
Prothonotary.

Endorsement: 106. July term, 1894, supreme court of Pennsylvania, eastern district. Comm'th, appellant, *vs.* J. Otis Paul. Appeal and affidavit. A. Morton Cooper, Carroll R. Williams; George S. Graham, district attorney. Filed May 26, 1894, in supreme court.

14 *Precipe for Certiorari.*

In the Supreme Court of Pennsylvania for the Eastern District.

COMMONWEALTH OF PENNSYLVANIA, Plaintiff, Appellant,
vs.
J. OTIS PAUL, Defendant, Appellee. } No. 372. Certiorari to the Court of Quarter Sessions of the County of Philadelphia, of October Term, 1893.

Issue certiorari to the court of quarter sessions of the county of Philadelphia to bring up record and proceedings in a certain action

in said court, No. 372, October term, 1893, wherein Commonwealth of Pennsylvania is plaintiff and J. Otis Paul is defendant.

Returnable to next term *sec. reg.*

A. MORTON COOPER,
CARROLL R. WILLIAMS,
GEORGE S. GRAHAM, *District Attorney,*
Attorneys for Plaintiff & Appellant.

To Charles S. Greene, proth'y sup. court, E. D.

Endorsement: No. 106. July term, 1894, supreme court of Pennsylvania, eastern district. Comm'th, appellant, *vs.* J. Otis Paul. Precipe for certiorari. A. Morton Cooper, Carroll R. Williams; George S. Graham, district attorney. Filed May 26, 1894, in supreme court.

15 *Writ of Certiorari.*

EASTERN DISTRICT OF PENNSYLVANIA, } *ss:*
City and County of Philadelphia, }

The Commonwealth of Pennsylvania to the justices of the court of quarter sessions for the county of Philadelphia, Greeting:

We, being willing for certain causes to be certified of the matter of the appeal of Commonwealth of Pennsylvania from the judgment in No. 372, October sessions, 1893, wherein the said appellant was plaintiff and J. Otis Paul was defendant, before you or some of you depending, do command you that the record and proceedings aforesaid, with all things touching the same, before the justices of our supreme court of Pennsylvania, at a supreme court to be holden at Philadelphia, in and for the eastern district, the first Monday of January next, so full and entire as in our court before you they remain, you certify and send, together with this writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

Witness the Honorable James P. Sterrett, doctor of laws, chief justice of our said supreme court, at Philadelphia, the twenty-
[L. S.] sixth day of May, in the year of our Lord one thousand eight hundred and ninety-four.

CHARLES S. GREENE,
Prothonotary.

16 Endorsement: 372. October sess., 1893. Q. S. Philadelphia. No. 106. July term, 1894, supreme court. Commonwealth of Pennsylvania, appellant, *v.* J. Otis Paul. Certiorari to the court of quarter sessions for the county of Philadelphia, returnable the first Monday of January, 1895. Rule on the appellee to appear and plead on the return day of the writ. Brought into office May 26, 1894. A. Morton Cooper, Carroll R. Williams; George S. Graham, district attorney. Filed Dec. 27, 1894, in supreme court.

To the honorable the judges of the supreme court of the Commonwealth of Pennsylvania, sitting in and for the eastern district:

The record and process and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

J. I. CLARK HARE. [L. S.]

True Bill.

CITY AND COUNTY OF PHILADELPHIA, *ss:*

In the Court of Quarter Sessions of the Peace for the City and County of Philadelphia, October Sessions, 1893.

The grand inquest of the Commonwealth of Pennsylvania, inquiring for the city and county of Philadelphia, upon their respective oaths and affirmations do present that J. Otis Paul, late of the said county, yeoman, on the second day of October, in the year of our Lord one thousand eight hundred and ninety-three, at the county aforesaid and within the jurisdiction of this court, did then and there unlawfully sell as an article of food a certain article manufactured out of some oleaginous substance and compound
17 of the same other than that produced form unadulterated milk and cream from the same, the said article being designed to take the place of butter produced from pure, unadulterated milk and cream from the same, contrary to the form of the act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the grand inquest aforesaid upon their oaths and affirmations aforesaid do further present that the said J. Otis Paul, late of the said county, yeoman, on the second day of October, in the year of our Lord one thousand eight hundred and ninety-three, at the county aforesaid and within the jurisdiction of this court, did then and there unlawfully sell as an article of food a certain substance in imitation of butter, contrary to the form of the act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the grand inquest aforesaid upon their respective oaths and affirmations aforesaid do further present that the said J. Otis Paul, late of the said county, yeoman, on the second day of October, in the year of our Lord one thousand eight hundred and ninety-three, at the county aforesaid and within the jurisdiction of this court, did then and there unlawfully sell as an article of food adulterated butter, contrary to the form of the act of the General
18 Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the grand inquest aforesaid upon their oaths and affirmations aforesaid do further present that the said J. Otis Paul, late of the said county, yeoman, on the second day of October, in the year of our Lord one thousand eight hundred and ninety-three, at

the county aforesaid and within the jurisdiction of this court, did then and there unlawfully offer for sale as an article of food a certain article manufactured out of some oleaginous substance and compound of the same other than that produced from unadulterated milk and cream from the same, the said article being designed to take the place of butter produced from pure, unadulterated milk and cream from the same, contrary to the form of the act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the grand inquest aforesaid upon their oaths and affirmations aforesaid do further present that the said J. Otis Paul, late of the said county, yeoman, on the second day of October, in the year of our Lord one thousand eight hundred and ninety-three, at the county aforesaid and within the jurisdiction of this court,
19 did then and there unlawfully offer for sale as an article of food a certain article in imitation of butter, contrary to the form of the act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the grand inquest aforesaid upon their oaths and affirmations aforesaid do further present that the said J. Otis Paul, late of the said county, yeoman, on the second day of October, in the year of our Lord one thousand eight hundred and ninety-three, at the county aforesaid and within the jurisdiction of this court, did then and there unlawfully offer for sale as an article of food adulterated butter, contrary to the form of the act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the grand inquest aforesaid upon their respective oaths and affirmations aforesaid do further present that the said J. Otis Paul, late of the said county, yeoman, on the second day of October, in the year of our Lord one thousand eight hundred and ninety-three, at the county aforesaid and within the jurisdiction of this court, did then and there have in his possession, with intent
20 to sell as an article of food, a certain article manufactured out of some oleaginous substance and compound of the same other than that produced from unadulterated milk and cream from the same, the said article being designed to take the place of butter produced from pure, unadulterated milk and cream from the same, contrary to the form of the act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the grand inquest aforesaid upon their oaths and affirmations aforesaid do further present that the said J. Otis Paul, late of the said county, yeoman, on the second day of October, in the year of our Lord one thousand eight hundred and ninety-three, at the county aforesaid and within the jurisdiction of this court, did then and there unlawfully have in his possession, with intent to sell as an article of food, a certain substance in imitation of butter, contrary to the form of the act of the General Assembly in such case

made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the grand inquest aforesaid upon their oaths and affirmations aforesaid do further present that the said J. Otis Paul, late of the said county, yeoman, on the second day of October, in the year of our Lord one thousand eight hundred and ninety-
21 three, at the county aforesaid and within the jurisdiction of this court, did then and there unlawfully have in his possession, with intent to sell as an article of food, adulterated butter, contrary to the form of the act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

GEORGE S. GRAHAM,
District Attorney.

Endorsement: Witnesses: Evan R. Penrose, P. O. bldg., Phila., Pa.; Maggie Donnelly, Jas. E. Crawford, E. F. Donnelly, W. J. Sloan, A. K. Cassell, 1326 Chestnut St., Phila., Pa.; Dr. Wm. Beam, Dr. Henry Leffmann, 715 Walnut St., Phila., Pa. 10, 1893, bail, $500, to October term, '93. No. 519 Noble St., 2nd ward. District attorney. 11, 3, 1893, recognizance of defendant and surety forfeited. No. 372. October sessions, 1893. Commonwealth *vs.* J. Otis Paul, 214 Callowhill St. Selling imitation butter, having the same in possession with intent to sell as an article of food. True bill. C. A. Porter, foreman. Oct. 16, 1893. 11, 16, '93, the defendant, being arraigned, plead not guilty. Dist. att'y sim., *et* issue.

Verdict, —— —, 189–.
Sentence, —.

COMMONWEALTH
vs.
J. OTIS PAUL and GEORGE E. PAUL.

List of Witnesses.

1. Evan R. Penrose, deputy collector of internal revenue, P. O. bldg., Phila.
2. Rose Donnelly, 36 North 16th street, Phila.
3. E. F. Donnelly, " " " "
4. J. E. Crawford, room 35, 1326 Chestnut St., "
22 5. W. J. Sloan, room 35, 1326 Chestnut St., Phila.
6. Dr. William Beam, 715 Walnut " "
7. Dr. Henry Leffmann, " " " "
8. Frank Lieber, 924 Ridge Ave., "
9. Joseph Beal, 2859 Fox street, "

The following witnesses are retail dealers in oleo. who have bought the article from the defendants. The subpœnas for them should require them to produce all bills and receipts and cancelled checks issued in payment for oleo. purchased from the defendants in the past two years:

1. C. Howard Wortman, 2228 North 28th street, Philadelphia, Pa.

2. James J. Curran, Frankford road near Somerset street, Phila., Pa.
3. John A. Frost, stall 189 Union m'k't, Callowhill & N. 2nd St., Phila., Pa.
4. George Stewart, Eleventh-street " Phila., Pa.
5. Orlando Reynor, 4465 Frankford avenue, "
6. William Talbot, 1232 North 2nd street, "
7. Thomas Callahan, 356 " Front " "
8. A. F. Reiser, 408 New Market " "

The house of refuge made a large number of purchases from the defendants. Summon John M. Schwartz, 1116 Girard street, bookkeeper of house of refuge, to produce receipted bills from the defendants for oleomargarine bought from the defendants in the past two years.

Endorsement: List of witnesses in case of Commonwealth *vs.* J. Otis Paul, George E. Paul. Nov. 13, '93.

23 COMMONWEALTH OF PENNSYLVANIA
vs.
J. OTIS PAUL.

Special Verdict.

The jury find the following facts:

(1.) The defendant, J. Otis Paul, is a resident and citizen of the Commonwealth of Pennsylvania and is the duly authorized agent in the city of Philadelphia of Braun and Fitts, Chicago, Illinois.

(2.) The said Braun and Fitts are engaged in the manufacture of oleomargarine in the said city of Chicago and State of Illinois, and as such manufacturers have complied with all the provisions of the act of Congress of August 2nd, 1886, entitled "An act defining butter; also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine."

(3.) The said defendant, as agent aforesaid, is engaged in business at No. 214 Callowhill street, in the city of Philadelphia, as wholesale dealer in oleomargarine, and was so engaged on the second day of October, 1893.

(4.) The said defendant, on the first day of July, 1893, paid to the collector of internal revenue of the first district of Pennsylva-
24 nia the sum of four hundred and eighty dollars as and for a special tax upon the business, as agent for Braun and Fitts Company, in oleomargarine, and obtained from said collector a writing in the words following:

Stamp for $480 per year. No. A 431.	United States internal revenue.	Special tax, $480 per year. No. A 431.

Received from J. Otis Paul & Geo. E. Paul, agents for the Chicago Butterine Co., the sum of four hundred and eighty dollars for

special tax on the business of wholesale dealer- in oleomargarine, to be carried on at 214 Callowhill street, Philadelphia, State of Pennsylvania, for the period represented by the coupon or coupons hereto attached.

Dated at Philadelphia, Pa., July 1st, 1893.

[SEAL.] WILLIAM H. DOYLE,

$480. *Collector, First District of Pennsylvania.*

The following clauses appear on the margin of the above:

The stamp is simply a receipt for a tax due the Government and does not exempt the holder from any penalty or punishment provided for by the law of any State for carrying on the said business within such State and does not authorize the commencement nor the continuance of such business contrary to the laws of such State or in places prohibited by a municipal law. See section 3243, Revised Statutes U. S.

25 Severe penalties are imposed for neglect or refusal to place and keep this stamp conspicuously in your establishment or place of business. Act of August 2nd, 1886.

Attached to this were coupons for each month of the year in form as follows:

Coupon for special tax on wholesale dealer in oleomargarine for October, 1893.

(5.) On or before the said second day of October, 1893, the said Braun & Fitts shipped to the said defendant, their agent aforesaid, at their place of business in Philadelphia, a package of oleomargarine separate and apart from all other packages, being a tub thereof containing ten pounds, packed, sealed, marked, stamped, and branded in accordance with the requirements of the said act of Congress of August second, 1886. The said package was an original package, as required by said act, and was of such form, size, and weight as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce, and the said form, size, and weight were adopted in good faith and not for the purpose of evading the laws of the Commonwealth of Pennsylvania, said package being one of a number of similar packages forming one consignment shipped by the said company to the said defendant. Said package- forming said consignment were unloaded from the cars and placed in defendant's store and there offered for sale as an article of food.

26 (6.) On the said second day of October, 1893, in the said city of Philadelphia, at the place of business aforesaid, the said defendant, as wholesale dealer aforesaid, sold to James E. Crawford the said tub or package mentioned in the foregoing paragraph, the oleomargarine therein contained remaining in the original package, being the same package, with seals, marks, stamps, and brands unbroken, in which it was packed by the said manufacturer in the said city of Chicago, Illinois, and thence transported into the city of Philadelphia and delivered by the carrier to the defendant; and the said tub was not broken nor opened on the said premises of the said

defendant, and as soon as it was purchased by the said James E. Crawford it was removed from the said premises.

(7.) The oleomargarine contained in said tub was manufactured out of an oleaginous substance not produced from unadulterated milk or cream, and was an article designed to take the place of butter, and sold by the defendant to James E. Crawford as an article of food; but the fact that the article was oleomargarine and not butter was made known by the defendant to the purchaser, and there was no attempt or purpose on the part of the defendant to sell the article as butter or any understanding on the part of the purchaser that he was buying anything but oleomargarine, and the said oleomargarine is recognized by the said act of Congress of August 2nd, 1886, as an article of commerce.

27 (8.) The above transaction specifically found by the jury is one of many transactions of like character made by the defendant during the last two years.

Endorsement: Court of quarter sessions. October sessions, 1893. No. 372. Commonwealth *vs.* J. Otis Paul. Special verdict. November 16, 1893. Special verdict of July finding the facts as within stated.

October Sessions, 1893.

COM. *vs.* J. OTIS PAUL. } 372. True Bill.

Selling imitation butter, having the same in possession with intent to sell as an article of food.

November 16th, 1893—Present: Hon. J. I. Clark Hare. Defendant present, and, being arraigned, pleads not guilty.

District attorney sim., *et* issue.

Same day, defendant present is put upon trial; a jury, being called, answer, appear, and are chosen as follows: Edward Hanley, Michael J. Hayden, Samuel Cress, Thos. Wolf, Frank Rantz, Jno. Hablutzel, Harry Boyer, Samuel Strang, Harry M. White, Jno. Burkmire, A. Stevens, Matthew Haas, who were all duly empanelled, sworn, or affirmed, and, being charged by the court, do find that—

(1) The defendant, J. Otis Paul, is a resident and citizen of the Commonwealth of Pennsylvania, and is the duly authorized agent in the city of Philadelphia of Braun & Fitts, of Chicago, Illinois.

28 (2) The said Braun & Fitts are engaged in the manufacture of oleomargarine in the said city of Chicago and State of Illinois, and as such manufacturers have complied with all the provisions of the act of Congress of August 2nd, 1886, entitled "An act defining butter; also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine."

(3) The said defendant, as agent aforesaid, is engaged in business at No. 214 Callowhill street, in the city of Philadelphia, as wholesale dealer in oleomargarine, and was so engaged on the second day of October, 1893; paid to the collector of internal revenue of the first

district of Pennsylvania the sum of four hundred and eighty dollars as and for a special tax upon the business, as agent for Braun & Fitts Company, in oleomargarine, and obtained from said collector a writing in the words following:

Stamp for $480 per year. No. A 431.	United States internal revenue.	Special tax, $480 per year. No. A 431.

Received from J. Otis Paul and Geo. E. Paul, agents for the Chicago Butterine Company, the sum of four hundred and eighty dollars for special tax on the business of wholesale dealer- in oleomargarine, to be carried on at No. 214 Callowhill street, Philadelphia, State of Pennsylvania, for the period represented by the coupon or coupons hereto attached.

29 Dated at Philadelphia, Pa., July 1st, 1893.

[SEAL.] WILLIAM H. DOYLE,

($480.) *Collector, First District of Pennsylvania.*

The following clauses appear on the margin of the above: This stamp is simply a receipt for a tax due the Government, and does not exempt the holder from any penalty or punishment provided for by the law of any State for carrying on the said business within such State, and does not authorize the commencement nor the continuance of such business contrary to the laws of such State or in places prohibited by a municipal law. See section 3243, Revised Statutes U. S.

Severe penalties are imposed for neglect or refusal to place and keep this stamp conspicuously in your establishment or place of business. Act of August 2nd, 1886. Attached to this were coupons for each month of the year in form as follows: Coupons for special tax on wholesale dealer in oleomargarine for October, 1893.

On or before the said second day of October, 1893, the said Braun & Fitts shipped to the said defendant, their agents aforesaid, at *their* place of business in Philadelphia, a package of oleomargarine, separate and apart from all other packages, being a tub thereof containing ten pounds, packed, sealed, marked, stamped, and branded in accordance with the requirements of the said act of Congress of August 2nd, 1886. The said package was an original package, as required by said act, and was of such form, size, and weight

30 as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation or merchandise between dealers in the ordinary course of actual commerce, and the said form, size, and weight were adopted in good faith and not for the purpose of evading the laws of the Commonwealth of Pennsylvania, said package being one of a number of similar packages forming one consignment shipped by the said company to the said defendant. Said packages forming said consignment were unloaded from the cars and placed in defendant's store and were offered for sale as an article of food.

(6th.) On the said second day of October, 1893, in the said city

of Philadelphia, at the place of business aforesaid, the said defendant, as wholesale dealer aforesaid, sold to James E. Crawford the said tub or package mentioned in the foregoing paragraph, the oleomargarine therein contained remaining in the original package, being the same package, with seals, marks, stamps, and brands unbroken, in which it was packed by the said manufacturer in the said city of Chicago, Illinois, and thence transported into the city of Philadelphia and delivered by the carrier to the defendant, and the said tub was not broken nor opened on the said premises of the said defendant, and as soon as it was purchased by the said James E. Crawford it was removed from the said premises.

(7th.) The oleomargarine contained in said tub was manufactured out of an oleaginous substance not produced from unadulterated milk or cream, and was an article designed to take the place of butter, and sold by the defendant to James E. Crawford as an
31 article of food; but the fact that the article was oleomargarine and not butter was made known by the defendant to the purchaser, and there was no attempt or purpose on the part of the defendant to sell the article as butter or any understanding on the part of the purchaser that he was buying anything but oleomargarine, and the said oleomargarine is recognized by the said act of Congress of August 2nd, 1886, as an article of commerce.

(8th.) The above transaction specifically found by the jury is one of many transactions of like character made by the defendant during the last two years.

Whereupon the district attorney, on behalf of the Commonwealth, moves the court for judgment upon the verdict in favor of the Commonwealth and against the defendant.

November 27th, 1893—present, Hon. J. I. Clark Hare—motion for judgment argued and held under advisement.

April 18th, 1894—present, Hon. J. I. Clark Hare—judgment entered for the defendant upon the special verdict.

May 26th, 1894.—Certiorari brought into office.

Assignments of Error.

Supreme Court for Eastern District, July Term, 1894.

COMMONWEALTH OF PENNSYLVANIA, Appellant,
vs.
J. OTIS PAUL, Defendant Below and Appellee. } No. 106.

32 Appeal of plaintiff from the judgment of and certiorari to the court of quarter sessions of Philadelphia county, October term, 1893, No. 372.

The Commonwealth in the above case assigns as error:

1. The court erred in entering judgment for the defendant on the special verdict.

2. The court erred in not entering judgment for the plaintiff on the special verdict.

A. MORTON COOPER,
CARROLL R. WILLIAMS,
GEO. S. GRAHAM,
Per C. R. W., *Dist. Att'y,*
Attorneys for the Commonwealth.

Endorsement: No. 106. July term, 1894, supreme court, eastern dist. Com. of Pennsylvania, appellant, *vs.* J. Otis Paul. Assignments of error. A. Morton Cooper, Carroll R. Williams; Geo. S. Graham, dist. att'y, for Commonwealth. Filed Jan. 7, 1895, in supreme court.

Opinion of the Supreme Court of Pennsylvania.

COMMONWEALTH, App't, *vs.* J. OTIS PAUL. } 106. July Term, 1894.

Appeal from the judgment of the court of quarter sessions of the peace of Philadelphia Co.

WILLIAMS, *J.:*

It is not necessary to the decision of this case that we should
33 enter upon the discussion of the existence and extent of the police power residing in the several States of the Union. It is quite as unnecessary to argue that the power of Congress to regulate commerce between the citizens of the different States was not intended to abridge the lawful exercise of the police power by any of the State governments. If judicial decisions can be said to settle any question, these questions are clearly and properly settled by the decisions of the highest tribunal known to our laws, and settled in accordance with the rules laid down in this State since its first organization. In Commonwealth *vs.* Power, 127 U. S., 678, the right of this State to deal, in the exercise of its police power, with the manufacture and sale of oleomargarine and the validity of the particular statute under consideration in this case were distinctly affirmed. During the last year (1894) a Massachusetts statute relating to the same subject came before the Supreme Court of the U. S. in Plumley *vs.* Massachusetts, 155 U. S., 461, and was sustained as a lawful exercise of the police power. The defendant in that case had, as the defendant in this case has, a license from the internal revenue department of the United States authorizing him to deal in oleomargarine. It was held, however, that this did not authorize him to engage in the manufacture or sale of oleomargarine in violation of the State laws lawfully passed forbidding or regulating such manufacture and sale. The dealer in articles which the State in the exercise of its police power places under restrictions must make his peace with the State in which his business is conducted, as
34 well as with the internal revenue laws of the United States. This proposition the defendant denies. He has made his

peace with the tax laws of the United States, but denies the power of the State to regulate or restrict his sales of the commodity in which he deals, and asserts that he is engaged in interstate commerce within the true intent of the constitutional provision conferring upon Congress the power to regulate commerce between the several States. In determining the question thus raised it is important to keep in mind the facts found by the special verdict, as follows: 1. The defendant is a resident in and citizen of this State, with a store or place of business at No. 214 Callowhill street, Philadelphia. 2nd. He is conducting the sale of oleomargarine as the agent for the "Chicago Butterine Company," which is a firm or corporation doing business in Illinois, and is the licensed dealer at No. 214 Callowhill street. 3. The oleomargarine was not made from milk or cream. It was designed to be used in place of butter. It was sent from Chicago to Philadelphia to be sold as food, and the tub sold to Crawford, which is complained of in this case, was sold to him for use as an article of food. 4. The tub contained ten pounds only, was put up, sealed, and stamped at the factory in the State of Illinois, was received in the same form in Philadelphia, and then "placed in defendant's store and offered for sale as an article of food." 5. This was one of "many transactions of like character made by the defendant during the last two years," or, in other words, this was the way in which the defendant did business for
his non-resident principals, the manufacturers. They put up
35 the article in ten-pound packages suited for the retail trade,
and because they do not allow their agents to open or divide these they treat their trade as wholesale, though in fact they supply the actual consumer and not the retail dealers. Looking now at these facts in the light of the cases cited, we shall find every question raised by them has been decided against the defendant by the Supreme Court of the United States except one. The validity of our act of assembly has been distinctly affirmed as a lawful exercise of the police power. The fact that an internal-revenue license affords the defendant no justification for disregarding a lawful exercise of the police power by the State is stated with equal clearness. The proposition that the judiciary of the United States should not strike down the police power of the States in the exposition of the interstate commerce powers of the General Government was asserted and abundantly vindicated in Plumley *vs.* Massachusetts, *supra*, decided within the last year. Our statute is directed especially against the sale of oleomargarine as an article of food. The defendant, in willful and flagrant disregard of the letter as well as the spirit of the statute, keeps these tubs of the commodity manufactured by his principals at the store in Callowhill street for sale "as an article of food." He offers them for sale for use as an article of food, and he sold to Crawford the ten-pound tub, which is the ground of complaint in this case, for use as food. Now, it is very clear that
36 this sale was a violation of our statute. The conviction was
eminently proper therefore and should be sustained unless the sale can be justified as one made of an original package within the proper meaning of that phrase. The non-residence of the manu-

facturer does not play any important part in this case, for he comes into this State to establish a "store" for the sale of his goods, pays the license exacted by the revenue laws, and puts his agent in charge of the sale of his goods from his store not to the trade, but to consumers. We have, therefore, a Pennsylvania store selling its stock of goods to its customers for their consumption from its own shelves, and unless these goods are in such original packages as the laws of the United States must protect, the sale is clearly punishable under our statute.

We first encountered this question of what shall constitute an original package within the meaning of our national interstate commerce legislation in Commonwealth *vs.* Zelt, 138 Pa., 615. A non-resident manufacturer of intoxicating drinks put up his whiskey and other liquors in quart and pint bottles adapted for use in the retail trade to consumers. These he sent to an agent in charge of a store rented for the purpose in Washington, Pa. The bottles were corked, some sealing wax put over the cork, and the brand or initials of the manufacturer impressed thereon. The bottles so secured were then put in pasteboard boxes or covers and packed in open boxes or barrels for shipment to the Pennsylvania store.

37 When they were received at the store the bottles were arranged and displ-yed on the shelves and offered for sale to the consumer as original packages of whiskey. Neither the distiller who shipped the whiskey nor his agent who sold it had a license to sell intoxicating drinks under the liquor laws of this State, but made sales of whiskey and beer by the pint and quart under the pretence that each bottle was an original package of commerce. The learned judge before whom an indictment against the seller of the bottles of liquor was brought to trial submitted the question to the jury whether the method of putting up the liquors in bottles was not adopted as a device to evade the liquor laws of this State. The jury found the fact to be that it was a mere device and rendered a verdict of guilty. Upon an appeal to this court the ruling of the court below was affirmed, and in speaking on the second assignment of error we said that whether whiskey or beer could be put up in pint bottles and sold by the single bottle as an original package under the protection of the interstate commerce laws was a question that would be decided when it was squarely raised. The question was next raised in Commonwealth *vs.* Schollenberger, 156 Pa., 201, and its decision became necessary to the disposition of that case. In that case a non-resident manufacturer of oleomargarine had established a store for its sale in Phila. and held a license under the internal-revenue laws authorizing such sale.

38 His agent sold a tub of "the goods" to a boarding-house keeper for use in the place of butter on his table. The defence was that the tub had not been broken or divided by the seller, and was therefore an original package within the meaning of the interstate-commerce cases. We held that the conclusion did not follow from the fact stated, and attempted to define an "original package" as such a package as was used in good faith by producers

and shippers for convenience in handling and security in transportation of their wares in the ordinary course of actual commerce.

But we also said that where the size of the package was adapted for the retail trade, so that "breaking of bulk" was not necessary to "reduce the goods into the common mass" and fit them for the retail trade, the traffic so conducted was not interstate, but infrastate commerce; or, in other words, the common every-day retail traffic of the community in which the store was located. Let us look at the consequences of the adoption of the opposite rule. If a pint bottle of whiskey is an original package under the protection of Congress, and can be sold as such regardless of the police legislation of the State, we cannot punish the sale to a minor, to a person of known intemperate habits, to a lunatic, on election days, or on the Sabbath. All power over the traffic for police purposes is gone. And why? Because the power to regulate interstate commerce, intended to guard against stoppage along State lines for examination or the collection of customs duties, has been ex-
39 tended by construction until it is made to reach and protect a retail traffic carried on within any State if the things sold have come into the retailer's store from a non-resident manufacturer or shipper. If this be a sound construction, then the power of a State to restrict or prohibit an injurious traffic does not depend on the deleterious character of the thing sold or the manner in which sales are made or the public or private injury inflicted by the sale, but on the manner in which the thing sold comes into possession of the seller. If he makes the article or buys it of another citizen of the State, he cannot sell it without punishment.

If he buys it of a non-resident who sends it to him across the State line, he may sell it with impunity and the State is powerless to stay his hands or to regulate his sales. A pint of whiskey put up in a flask, if made or bought in this State, cannot be sold without a license granted by the courts after an examination into the character of the applicant and his business. The same flask of whiskey put up across the border may come as an original package into any community and be sold to any person, whether a minor, a drunkard, or a lunatic, under the protection of the Constitution of the United States.

We cannot adopt a construction that seems to us so unnatural and unreasonable and that would work such absurd and monstrous results. On the contrary, we hold, as we think is held by the recent case of Plumley *v.* Massachusetts, already referred to, that the mere fact that a police law may affect the trade in articles brought
40 from another State does not amount to an attempt to regulate interstate commerce or to an assumption of power belonging to Congress. Coming now to the facts of this case, we find the alleged "original package of commerce" to be a small tub of oleomargarine containing ten pounds, and, in fact, sold to a consumer for use as an article of food upon his table. It is true that the defendant treats his trade as one carried on at wholesale, but the facts of the special verdict show that this is not because he supplies dealers or sells in large quantities for shipment, but because

he treats the little tubs and packages he sells his customers as "original packages of commerce" and his law-breaking traffic as "interstate commerce." He does not "break bulk" by taking one pound out of a package and weighing it on his scales for the supply of a customer, but requires him to take a whole tub, whether of ten pounds, or of two, or of one is immaterial, but it must be a whole package as it was put up at the factory. If the pint bottle or the pound package has not been opened and divided before the sale, the contention is that it has not become a part of "the common mass" of property entering into the ordinary business of the citizens of the State, but is an original — under the protection of Congress as interstate commerce.

The question to which we are thus brought is the same that was encountered in Commonwealth *v.* Schollenberger, 156 Pa.,
41 201. It is whether a package intended and used for the supply of the retail trade is an "original package" within the protection of the interstate-commerce cases.

We held in that case that a manufacturer who puts up his products in packages evidently adapted for and intended to meet the requirements of an unlawful retail trade in another State and sends them to his own agent in that State for sale to consumers is not engaged in interstate commerce, but is engaged in an effort to carry on a forbidden business by masquerading in a character to which he has no honest title.

We are not dealing with the legislative question. Whether the trade in oleomargarine is injurious and should be restricted is a question that has been decided for us. It has been declared injurious. It has been placed under restrictions. These restrictions have been held to be a valid exercise of the police power both by this court and the Supreme Court of the United States. Our question is whether this valid restriction can be enforced, or whether the transparent trick of putting up oleomargarine in small packages in another State, so that it can be sold at retail to consumers as an article of food, will clothe an unlawful retail traffic with the coat of mail belonging to honest, legitimate interstate commerce and set the police laws of the State at defiance.

In disposing of this question we hold as follows: 1st. The character of the package, whether original or not, is a question
42 of fact, when there are facts to be passed upon bearing upon this question, and should go to the jury.

2nd. It is a question of law when the facts are agreed upon or presented by a special verdict, as in this case, and should be decided by the court.

3rd. It is fair to presume that a package was intended by him who devised it for the purpose for which he uses it in his own business.

4th. A package devised by a non-resident manufacturer or put up by him adapted for sale at retail to individual consumers—such, for example, as a flask of whiskey or a tub or pail or roll of oleomargarine—and actually sold by him or his agent to the consumer for use as an article of food or drink in violation of the laws of the

State where such sales take place is not an "original package" within the meaning of the law relating to interstate commerce.

5th. The punishment of such sales under the police power of the State is not an interference with the powers of Congress or with the commerce between the States, which is protected by the Constitution of the United States.

The judgment is reversed and judgment is now entered on the special verdict in favor of the Commonwealth. The record is remitted that sentence may be imposed according to law.

43 Endorsement: 106. July term, 1894. Commonwealth, app't *v.* J. Otis Paul. Appeal from the judgment of the court of quarter sessions of Phila. county. 17 Jan'y, '95. Williams. Filed Oct. 7, 1895, in supreme court.

I hereby certify that the above and foregoing is a true and correct copy of the opinion in the above-entitled cause, so full and entire as appears of record in our said supreme court.

Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.

In testimony whereof I have hereunto set my hand and seal of said court, at Philadelphia, this 23rd day of October, A. D. 1895.

CHAS. S. GREENE,
Prothonotary.

44 UNITED STATES OF AMERICA, }
State of Pennsylvania, } *ss:*

I, Charles S. Greene, prothonotary of the supreme court of Pennsylvania, eastern district, do hereby certify that the foregoing record, pages 1 to 43, inclusive, is a true and faithful copy of the record and proceedings of the supreme court of the State of Pennsylvania, eastern district, in a certain suit therein pending, wherein Commonwealth of Pennsylvania was appellant and J. Otis Paul was appellee.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said supreme court of the State of Pennsylvania, eastern district, at Philadelphia, the 12th day of November, 1895, and in the one hundred and twentieth year of the Independence of the United States.

Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.

CHAS. S. GREENE,
Prothonotary of the Supreme Court of Pennsylvania, Eastern District.

45 I, James P. Sterrett, chief justice of the supreme court of Pennsylvania, do hereby certify that Charles S. Greene was at the time of signing the annexed attestation and now is prothonotary of the said supreme court of Pennsylvania in and for the eastern district, to whose acts as such full faith and credit are and ought to be given, and that the said attestation is in due form.

In witness whereof I have hereunto subscribed my name this

twelfth day of November, one thousand eight hundred and ninety-five.

JAMES P. STERRETT,
Chief Justice Sup. Court.

I, Charles S. Greene, prothonotary of the supreme court of Pennsylvania in and for the eastern district, do certify that the Honorable James P. Sterrett, by whom the foregoing certificate was made and given, was at the time of making and giving the same and is now chief justice of the supreme court of Pennsylvania, to whose acts as such full faith and credit are and ought to be given as well in courts of judicature as elsewhere, and that his signature thereto subscribed is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said supreme court of Pennsylvania in and for the eastern district, at Philadelphia, this twelfth day of November, one thousand eight hundred and ninety-five.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

CHAS. S. GREENE,
Prothonotary.

46 Supreme Court of U. S., Oct. Term, 1895.

J. OTIS PAUL (Plaintiff in Error),
v.
THE COMMONWEALTH OF PENNSYLVANIA. } No. 813.

Assignments of Error.

1st. The court erred in reversing the judgment of the court of quarter sessions, entered upon the findings of fact of the special jury, and in entering judgment for the Commonwealth of Pennsylvania.

2nd. The court erred in not affirming the judgment of the court of quarter sessions upon the findings of fact of the special verdict.

3rd. The court erred in failing to hold the act of 21st of May, 1885, null and void, in so far as it attempted to prohibit the sale of an article of interstate commerce in the original package of commerce.

4th. The court erred in holding that the sale by the defendant below was not a sale of an article of interstate commerce in the original package of commerce.

5th. The court erred in assuming that the sale by the defendant below was at retail; the special verdict found that the defendant below was a wholesale dealer.

6th. The court erred in apparently holding that, in the absence of any legislation in Pennsylvania with reference to the sale of oleomargarine by retail or by wholesale, a sale by retail would be void, although a sale by wholesale would be valid under the interstate-commerce law.

47 7th. The court erred in assuming that the sale by the defendant below was a sale to a consumer. The facts found by the special verdict were, "the said defendant, as wholesale dealer aforesaid, sold the said tub or package mentioned," without any finding as to the occupation of the purchaser.

8th. The court erred in holding, as it apparently did, that a sale to a consumer of an article of interstate commerce is not protected by art. 1, sec. 8, of the National Constitution, even though such sale was a sale in the original package of commerce.

9th. The court erred in holding that the sale by the defendant below was a sale of "a package devised by a non-resident manufacturer or put up by him, adapted for sale at retail to individual consumers." The findings of fact of the special verdict were the said package "was of such form, size, and weight as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandize in the ordinary course of actual commerce."

10th. The court erred in holding that the package sold by the defendant below was devised by the manufacturer of such form and size as to evade the laws of the State. The findings of the special verdict were, "the said form, size, and weight were adopted in good faith and not for the purpose of evading the laws of the Commonwealth of Pennsylvania."

A. B. RONEY,
R. C. DALE,
H. R. EDMUNDS,
Counsel for Plaintiff in Error

Endorsed on cover: Case No. 16,103. Pennsylvania supreme court. Term No., 384. J. Otis Paul, plaintiff in error, *vs.* The Commonwealth of Pennsylvania. Filed December 5th, 1895.

IN THE SUPREME COURT OF PENNSYLVANIA FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

JULY TERM, 1894.

COMMONWEALTH OF PENNSYLVANIA vs. J. OTIS PAUL, Defendant below and Appellee.	No. 106.

Appeal by plaintiff from the judgment of the Court of Quarter Sessions of Philadelphia County.

I, JAMES P. STERRETT, Chief Justice of the Supreme Court of Pennsylvania at the present time and upon the argument and hearing of the above entitled appeal, do hereby certify:

I. That upon the said argument and hearing the validity of the statute of Pennsylvania of May 21, 1885, was drawn in question by the said defendant J. Otis Paul on the ground of its being repugnant to section 8 of Article I of the Constitution of the United States, and that the decision of the said Supreme Court of Pennsylvania was in favor of the validity of the said statute.

II. That upon the said argument and hearing the said defendant J. Otis Paul specially set up and claimed the right, privilege and immunity under the said section 8 of Article I of the Constitution of the United States of selling an article of interstate commerce, and that the decision of the said Supreme Court of Pennsylvania was against the said right, privilege and immunity so set up and claimed as aforesaid.

III. That upon the said argument and hearing the said defendant J. Otis Paul specially set up and claimed that the said statute of Pennsylvania of May 21, 1885, was null and void under the Constitution of the United States in so far as it attempted to prohibit the sale of an article of interstate commerce in the original packages of commerce, and that the decision of the said Supreme Court of Pennsylvania was against the said claim.

IV. That upon the said argument and hearing, the said defendant J. Otis Paul specially set up and claimed that the sale of oleomargarine by him for which he was indicted was a sale of an article of interstate commerce in the original package of commerce and therefore within his rights, privileges and immunities under the Constitution of the United States, and that the decision of the said Supreme Court of Pennsylvania was against the said claim.

In witness whereof, I have hereunto subscribed my name this day of March, one thousand eight hundred and ninety-eight.

JAMES P. STERRETT,
Chief Justice Supreme Court.

March 21, 1898.

I, CHARLES S. GREENE, Prothonotary of the Supreme Court of Pennsylvania in and for the Eastern District, do certify that the Honorable JAMES P. STERRETT, by whom the foregoing certificate was made and given, was at the time of making and giving the same and is now Chief Justice of the Supreme Court of Pennsylvania to whose acts as such full faith and credit are and ought to be given as well in courts of judicature as elsewhere, and that his signature thereto subscribed is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court of Pennsylvania in and for the Eastern District, at Philadelphia this twenty-first day of March, one thousand eight hundred and ninety-eight.

CHAS. S. GREENE,
Prothonotary.

[SEAL.]

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 17.

CLARENCE E. COLLINS, PLAINTIFF IN ERROR,

vs.

THE STATE OF NEW HAMPSHIRE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE.

FILED MAY 20, 1894.

(15,598.)

(15,598.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 110.

CLARENCE E. COLLINS, PLAINTIFF IN ERROR,

vs.

THE STATE OF NEW HAMPSHIRE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 19, 1896.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of New Hampshire, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the State of New Hampshire in which a decision could be had in or upon an indictment found by the grand jury at a term of the said supreme court holden at Nashua, in and for said county of Hillsborough and State of New Hampshire, against Clarence E. Collins, of Manchester, in said county of Hillsborough, petitioner for writ of error to the United States Supreme Court, at Washington, in the District of Columbia, and the said State of New Hampshire appearing and opposing said petitioner for his writ of error, wherein was drawn in question the validity of a statute or law of said State of New Hampshire, on the ground of its being repugnant to the Constitution and laws of the United States, and the decision in and by said State court was in favor of the validity of such State law, and a manifest error hath happened, to the great damage of the said Clarence E. Collins, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further
2 to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the twelfth day of May, in the year of our Lord one thousand eight hundred and ninety-four.

[L. S.] FREMONT E. SHURTLEFF,
Clerk of the Circuit Court of the United States for the District of New Hampshire.

Allowed by—
C. DOE,
Chief Justice of the Supreme Court of the State of New Hampshire.

3 STATE OF NEW HAMPSHIRE, *Hillsborough,* } *ss:*

And now here the judges of the supreme court of the State of New Hampshire make return of this writ by annexing hereto and sending herewith under the seal of the said supreme court a true and

attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

Seal Supreme Court New Hampshire.

In testimony whereof I, Thomas D. Luce, clerk of said supreme court within and for the county of Hillsborough, have hereto set my hand and the seal of said court this twenty-first day of May, A. D. 1894.

THOS. D. LUCE, *Clerk.*

4 THE STATE OF NEW HAMPSHIRE, *Hillsborough*, } ss:

At the trial term of the supreme court, holden at Manchester, within and for said county of Hillsborough, on the first Tuesday of January, in the year of our Lord one thousand eight hundred and ninety-four.

Present: The Hon. Isaac W. Smith, presiding justice.

5 The grand jurors for the State of New Hampshire upon their oath present that Clarence E. Collins, of Manchester, in the county of Hillsborough aforesaid, on the nineteenth day of May, in the year of our Lord one thousand eight hundred and ninety-three, at Manchester, in the county of Hillsborough aforesaid, with force and arms did knowingly, unlawfully, and criminally sell to one Clifton B. Hildreth one package or tub of oleomargarine, otherwise called butterine, being a substance made wholly or in part of fats, oils, or grease not produced from milk or cream, in imitation of or as a substitute for butter, and being of another color than pink, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State.

And the jurors aforesaid upon their oath aforesaid do further present that the said Clarence E. Collins, at said Manchester, on said nineteenth day of May, did knowingly, unlawfully, and criminally sell to one Clifton B. Hildreth one package or tub of a substance or compound made wholly or in part of fats, oils, or grease not produced from milk or cream, in imitation of or as a substitute for butter, and being of another color than pink, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State.

This indictment was found and entered at the September term, 1893; the county solicitor appeared in behalf of the State; the said Clarence E. Collins, being arraigned, pleaded not guilty, and the court made the following order:

"STATE OF NEW HAMPSHIRE, *Hillsborough*, } *ss*:

Supreme Court, September Term, 1893.

Present: The Hon. Wm. M. Chase, presiding justice.

STATE
v.
CLARENCE E. COLLINS.

To Nathan P. Hunt, of Manchester, in said county of Hillsborough, Esquire:

By order of the court you are hereby appointed a commissioner to receive bail in the above-entitled matter. You will take the recognizance of said Clarence E. Collins, as principal, with two sufficient sureties in the sum of one thousand dollars each (two hundred dollars upon each of five indictments), upon condition that if said Clarence E. Collins shall personally attend said court when required to do so at the present or any future term of said court to answer further to the indictments now pending against him, and shall attend said court from day to day and there wait and abide the order of the court and not depart without leave until discharged by order of court, and in the meantime keep the peace and be of good behavior, then said recognizance shall be void.

You will immediately report to said court your doings herein.

Dated the 24th day of November, 1893.

[L. S.] THOS. D. LUCE, *Clerk*."

And thereafterwards, on the twenty-seventh day of November, 1893, the said Clarence E. Collins put himself upon the country and the county solicitor joined said issue.

Whereupon, the county solicitor and counsel for the respondent being fully heard upon the evidence, the cause was committed to a jury sworn according to law to try the issue, to wit, Frank X. Foster, foreman; M. S. Thompson, J. P. Howe, J. J. Bennett, J. A. Coburn, W. T. Payne, E. E. Wilkins, G. W. Blair, M. C. Mullin, D. J. Cullinane, G. S. Parkhurst, and F. B. Goodhue, who made return of their verdict thereon upon oath and said the said Clarence E. Collins is guilty; and certain questions of law arising upon said indictment, the same were reserved and assigned to the determination of the court at the next law term, as follows:

HILLSBOROUGH, *ss:*

Supreme Court, September Term, 1893.

STATE
vs.
CLARENCE E. COLLINS.

Indictment for selling a package of oleomargarine not of a pink color, in violation of Public Statutes, chapter 127, sections 19, 20; trial by jury; verdict, guilty.

The respondent is agent at Manchester of Swift & Co., an Illinois corporation, having its principal place of business in Chi-
7 cago. The corporation manufactures oleomargarine and puts it up in packages in Chicago, and distributes the packages from there to different places—one of which is Manchester—where it maintains stores and sells the article at wholesale in the original packages. It has paid the special U. S. taxes imposed by the act of Congress of August 2, 1886 (Suplt. to R. S. of U. S., v. 1, p. 505), and has complied with all other requirements of that act in respect to the manufacture and sale at wholesale of oleomargarine. The article has the color of butter, the same coloring matter being used to color it that is frequently used to color butter, and is made wholly or in part of fats, oils, or grease not produced from milk or cream, in imitation of or as a substitute for butter. It is not manufactured in this State. The respondent as such agent sold in Manchester, at wholesale, at the store of the company, a package of said article weighing ten pounds in the form it was put up in Chicago by his principal. The provisions of section 19, chapter 127, Public Statutes of this State were complied with, so far as the package was concerned, except the color of its contents was not pink. The oleomargarine sold was the oleomargarine of commerce as the same is known and dealt in as an article of food.

The respondent claimed that upon these facts he was not guilty, because the statute of this State is in contravention of the Constitution of the United States and its amendments and of the laws of Congress; otherwise he admitted his guilt. The court ruled against the respondent as to the above claim, and he excepted.

Reserved.

WM. M. CHASE,
Presiding Justice.

And said indictment was continued to this term, when the county solicitor and said respondent appear, and N. P. Hunt, heretofore appointed by the court a commissioner to take bail, makes the following return upon his commission:

To the supreme court:

On this 19th day of January, 1894, I took the recognizance of Clarence E. Collins, principal, and Horatio W. Heath and
8 George B. Chandler, sureties, in accordance with the terms of the foregoing commission.

N. P. HUNT,
Commissioner.

And thereafterwards, at the adjourned law term of said court, the sixteenth day of March, 1894, the court render the followi opinion:

The need of a uniform operation of Federal law in all the Sta and the apparent degree of uncertainty as to the view *of* the Fe eral court may take of this statute are reasons for a disposition the case that will furnish an opportunity to carry the Federal qu tion to the only tribunal by which that question can be settl and thereupon said questions of law are returned to the trial te with an order that the exceptions be overruled.

It is therefore considered by the court that the said Clarence Collins pay a fine of one hundred dollars for the use of the cou of Hillsborough; that he pay the costs of prosecution, taxed at thir seven dollars and ten cents, and stand committed till sentence performed.

Attest: THOS. D. LUCE, *Clerk*

9 STATE OF NEW HAMPSHIRE, *Hillsborough*, } *ss*:

At the supreme court holden at Nashua, within and for t county of Hillsborough aforesaid, on the third Tuesday of Septe ber, in the year of our Lord one thousand eight hundred a ninety-three.

The grand jurors for the State of New Hampshire upon th oath present that Clarence E. Collins, of Manchester, in the cou of Hillsborough aforesaid, on the nineteenth day of May, in t year of our Lord one thousand eight hundred and ninety-three, Manchester, in the county of Hillsborough aforesaid, with fo and arms did knowingly, unlawfully, and criminally sell to o Clifton B. Hildreth one package or tub of oleomargarine, otherw called butterine, being a substance made wholly or in part of fa oils, or grease not produced from milk or cream, in imitation of as a substitute for butter and being of another color than pink, c trary to the form of the statute in such case made and provid and against the peace and dignity of the State; and the jur aforesaid upon their oath aforesaid do further present that the s Clarence E. Collins, at said Manchester, on said nineteenth day May, did knowingly, unlawfully, and criminally sell to one Clif B. Hildreth one package or tub of a substance or compound ma wholly or in part of fats, oils, or grease, not produced from milk cream, in imitation of or as a substitute for butter and being or other color than pink, contrary to the form of the statute in su case made and provided and against the peace and dignity of State.

JAMES P. TUTTLE, *Solicitor*

This is a true bill.

JAMES B. WOODBURY, *Foreman*

10 STATE OF NEW HAMPSHIRE, *Hillsborough*, } *ss:*

Supreme Court, September Term, 1893.

Present: The Hon. Wm. M. Chase, presiding justice.

STATE
v.
CLARENCE E. COLLINS.

To Nathan P. Hunt, of Manchester, in said county of Hillsborough, Esquire:

By order of the court you are hereby appointed a commissioner to receive bail in the above-entitled matter. You will take the recognizance of said Clarence E. Collins, as principal, with two sufficient sureties in the sum of one thousand dollars each (two hundred dollars upon each of five indictments), upon condition that if said Clarence E. Collins shall personally attend said court when required to do so, at the present or any future term of said court, to answer further to the indictments now pending against him, and shall attend said court from day to day and there wait and abide the order of the court and not depart without leave until discharged by order of court, and in the meantime keep the peace and be of good behavior, then said recognizance shall be void.

You will immediately report to said court your doings herein.

Dated the 24th day of November, 1893.

[L. S.] THOS. D. LUCE, *Clerk.*

To the supreme court:

On this 19th day of January, 1894, I took the recognizance of Clarence E. Collins, principal, and Horatio W. Heath and George B. Chandler, sureties, in accordance with the terms of the foregoing commission.

N. P. HUNT, *Commissioner.*

11 HILLSBOROUGH, *ss:*

Supreme Court, September Term, 1893.

STATE
vs.
CLARENCE E. COLLINS.

Indictment for selling a package of oleomargarine not of a pink color, in violation of P. S. c. 127, ss. 19, 20. Trial by jury. Verdict guilty. The respondent is agent at Manchester of Swift & Co., an Illinois corporation, having its principal place of business in Chicago. The corporation manufactures oleomargarine and puts it up in packages in Chicago, and distributes the packages from there to different places—one of which is Manchester—where it maintains stores and sells the article at wholesale in the original packages. It has paid the special U. S. taxes imposed by the act of Congress of August 2, 1886, (Suplt. to R. S. of U. S., v. 1, p. 505), and has com-

plied with all other requirements of that act in respect to the manufacture and sale at wholesale of oleomargarine. The article has the color of butter—the same coloring matter being used to color it that is frequently used to color butter—and is made wholly or in part of fats, oils, or grease, not produced from milk or cream, in imitation of or as a substitute for butter. It is not manufactured in this State. The respondent as such agent sold in Manchester at wholesale at the store of the company, a package of said article weighing ten pounds, in the form it was put up in Chicago by his principal. The provisions of s. 19, c. 127, P. S. of this State were complied with, so far as the package was concerned, except the color of its contents was not pink. The oleomargarine sold was the oleomargarine of commerce as the same is known and dealt in as an article of food.

The respondent claimed that, upon these facts, he was not guilty because the statute of this State is in contravention of the Constitution of the United States and its amendments and of the laws of Congress; otherwise he admitted his guilt. The court ruled against the respondent as to the above claim, and he excepted.

Reserved.

WM. M. CHASE,
Presiding Justice.

[Endorsed:] Hillsborough case. State *v.* Clarence E. Collins. Solicitor-, Cross, Loveren. Copies dis. Nov. 29, 1893.

12 M'CH 16, '94.

Hills., 14.

STATE
v.
COLLINS.

DOE, *C. J.:*

The need of a uniform operation of Federal law in all the States and the apparent degree of uncertainty as to the view one Federal court may take of this statute are reasons for a disposition of the case that will furnish an opportunity to carry the Federal question to the only tribunal by which that question can be settled.

Exception overruled.

13 STATE OF NEW HAMPSHIRE, *Hillsborough,* ss:

I, Thomas D. Luce, clerk of the supreme court of the State of New Hampshire for the county of Hillsborough, do hereby certify that the foregoing is a true copy of the record in said action and of all papers on file in said cause, said court being the highest court of law or equity of the said State in which a decision could be had in the said cause.

Seal Supreme Court New Hampshire.

In witness whereof I have hereunto set my hand and affixed the seal of said supreme court this 16th day of April, A. D. 1894.

THOS. D. LUCE, *Clerk.*

I, Charles Doe, chief justice of the supreme court of the State of New Hampshire, do certify that Thomas D. Luce, Esquire, whose signature is affixed to the foregoing certificate, is clerk of said supreme court for the county of Hillsborough, and hath the keeping of the files, records, and proceedings of said court, and also of the files and records of the supreme judicial court, the court of common pleas, the superior court of judicature, and the circuit court, heretofore existing in this State, and is by law the proper person to make out and certify copies thereof, and that full faith and credit are and ought to be given to his acts and attestations done as aforesaid, and that his attestation above written is in due form, said court being the highest court of law or equity of the said State in which a decision could be had in the said cause.

In testimony whereof I have hereunto set my hand and caused the seal of the said supreme court to be hereunto affixed this 16th day of April, A. D. 1894.

Seal Supreme Court New Hampshire.

CHS. DOE.

14 UNITED STATES OF AMERICA, *State of New Hampshire.*

To the Honorable Charles Doe, chief justice of the supreme court of the State of New Hampshire:

Petition of Clarence E. Collins, of Manchester, in the county of Hillsborough and State of New Hampshire, respectfully shows that an indictment was found by the grand jury, at the September trial term, 1893, of the supreme court in and for said county of Hillsborough, against him under the Public Statutes of said State, chapter 127, sections 19 and 20, which read as follows:

"§ 19. It shall be unlawful to sell, offer for sale, or keep in possession with intent to sell, in this State, any substance or compound made wholly or in part of fats, oils, or grease, not produced from milk or cream, in imitation of, or as a substitute for, butter or cheese, unless the same is contained in tubs, firkins, boxes, or other packages, each of which has upon it, to indicate the character of its contents, the words "Adulterated butter," "Oleomargarine," or "Imitation cheese" as the case may be, in plain roman letters not less than one-half inch in length, and so placed and made or attached that they can be readily seen and read and cannot be easily defaced; and if the substance or compound is a substitute for cheese, unless the cloth surrounding it has a like inscription; and if it is a substitute for butter, unless it is of a pink color. When any such substance or compound is sold in less quantities than the original packages contain, the seller shall deliver to the purchaser with it a label bearing the words indicating its character as above, in like letters.

§ 20. If any person shall sell, or offer for sale, or keep in possession with intent to sell, in this State, any substance or compound of the kinds described in the preceding section in a manner that is made unlawful by said section, or shall sell, offer for sale, or keep

in possession with intent to sell, any such substance or com-
15 pound without disclosing its true character, he shall be fined not more than one hundred dollars, or be imprisoned not more than sixty days, or both," for selling a package of oleomargarine not of pink color, in violation of said statute; that upon said indictment there was a trial at said September term, and a verdict of guilty was returned by the jury under the instruction of the court.

Upon the trial of said case the facts were found that the respondent, your petitioner, at the time of the alleged offence was agent at Manchester aforesaid of Swift & Company, a foreign corporation, having its principal place of business in Chicago, State of Illinois, and there engaged in the manufacture and sale of oleomargarine in original packages, and that your petitioner, as such agent, sold in said Manchester, at wholesale, at the store of said Swift & Company, an original package of oleomargarine weighing ten pounds in the form in which it was put up in Chicago by his aforesaid principal, and for this sale said indictment was found against your petitioner; which oleomargarine sold was the oleomargarine of commerce as the same is known and dealt in as an article of food; that the provisions of section 19, chapter 127, of the Public Statutes of said New Hampshire were complied with so far as the package was concerned, except the color of its contents *were* not pink. It was further found as a fact in the trial of said case that said Swift & Company had paid a special United States tax imposed by the act of Congress of August 2, 1886 (Suplt. to R. S. of U. S., v. 1, p. 505), and had complied with all other requirements of that act in respect to the manufacture and sale at wholesale of oleomargarine.

Your petitioner, the respondent, claimed upon the said facts as found on trial that he was not guilty, because the statute aforesaid of the State of New Hampshire is in contravention of the Constitution of the United States and its amendments and the laws of Congress. The court ruled against the respondent, your
16 petitioner, and he excepted, and the case was transferred to the December law term, 1893, of the supreme court of said State of New Hampshire, and at the adjourned law term of said court in March, 1894, the exceptions were overruled and judgment on verdict was ordered, and at the trial term of said supreme court of Hillsborough county, holden at Manchester on the 7th day of April, 1894, judgment on the verdict was rendered and a fine imposed of one hundred dollars, which was duly recorded. The proceedings aforesaid upon the trial and the verdict by the jury and the transfer of the questions of law which arose upon the trial were before the highest court of said State in which a decision in said case could be had, and the judgment is final so far as the laws and courts of New Hampshire are concerned.

Said Swift & Company had complied with all the laws and regulations of the United States in the manufacture and sale at wholesale of oleomargarine in the original packages; the sale of oleomargarine for which said Collins was indicted was sold by him as agent of said Swift & Company in its original package; said oleomar-

garine is an article of commerce, as the same is known and dealt in, and the said sale was the act of said Swift & Company, a foreign corporation as aforesaid, through its agent, your petitioner, all of which aforesaid allegations or facts appear in the records of this case, copies of which are herewith submitted.

The said Collins claims that error in law appears of record in this case, and makes the following—

Assignment of Errors.

Said Collins in his aforesaid trial before the jury and before the supreme court of Nashua, New Hampshire, at its law term, contended that the said statute under which he was indicted as to him in the facts found were—

17 First. In contravention of section 8, article 1, of the Constitution of the United States, which provides that Congress shall have the power "to regulate commerce with foreign nations and among the several States and with the Indian tribes."

Second. That said statute is in contravention of that portion of article 6 of the Constitution of the United States which declares, "This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

Third. That said statute of New Hampshire is in contravention of the aforesaid statute of the United States passed August 2, 1886.

Said courts overruled his said contentions, which is error in law.

Wherefore your petitioner prays the allowance of a writ of error, returnable in the Supreme Court of the United States, and for citation; and your petitioner will ever pray.

CLARENCE E. COLLINS,
By his attorn*ies*, DAVID CROSS,
HARRY E. LOVEREN,
Manchester, New Hampshire.

May 8, 1894.—Ordered that a writ of error issue according to foregoing petition.

C. DOE,
Chief Justice of the Supreme Court of N. H.

18 UNITED STATES OF AMERICA, *ss:*

To the State of New Hampshire, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of New Hampshire for the county of Hillsborough, wherein Clarence E. Collins, of Manchester, in said county of Hillsborough, is plaintiff in error and you are defend-

ant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles Doe, chief justice of the supreme court of the State of New Hampshire, this 15th day of May, in the year of our Lord one thousand eight hundred and ninety-four.

C. DOE,
Chief Justice of the Supreme Court of the State of New Hampshire.

19 EXETER, N. H., *May 17th, A. D.* 1894.

I accept due service of the within citation.

STATE OF NEW HAMPSHIRE,
By EDWIN G. EASTMAN,
Attorney General of said State.

20 STATE OF NEW HAMPSHIRE, *Hillsborough,* } ss:

I, Thos. D. Luce, clerk of the supreme court within and for said county of Hillsborough, hereby certify that the foregoing are true copies of—

I. The writ of error and
II. The return thereon,
III. The record in the case of Clarence E. Collins,
IV. The application for writ of error and
V. The assignment of errors,
VI. And of all the proceedings in said case, with all things concerning the same, together with
VII. The original citation and
VIII. The acknowledgment of service thereon.

In witness whereof I have hereto set my hand and affixed the seal of said supreme court this twenty-first day of May, in the year of our Lord one thousand eight hundred and ninety-four.

[Seal Supreme Court New Hampshire.]

THOS. D. LUCE, *Clerk.*

21 *Bond on Writ of Error.*

Know all men by these presents that we, Clarence E. Collins, of Manchester, in the county of Hillsborough and State of New Hampshire, as principal, and Horatio W. Heath and George B. Chandler, both of said Manchester, as sureties, are held and firmly bound unto the State of New Hampshire in the full and just sum of one thousand dollars, to be paid to the State of New Hampshire or its certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 12th day of May, in the year of our Lord one thousand eight hundred and ninety-four.

Whereas lately, at a supreme court of New Hampshire, holding session in and for the county of Hillsborough and State of New Hampshire, against Clarence E. Collins, judgment was rendered against and final sentence imposed upon the said Clarence E. Collins that he may pay a fine of one hundred dollars and costs, and the said Clarence E. Collins having obtained a writ of error and filed a copy thereof in the clerk's office of the said supreme court of the State of New Hampshire to reverse the judgment in the aforesaid matter, and a citation directed to the State of New Hampshire, citing and admonishing it to be and appear at the Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Clarence E. Collins shall prosecute his said writ of error to effect, and if he fail to make his plea good shall answer all damages and costs, then the above obligation to be void; else to remain in full force and virtue.

CLARENCE E. COLLINS. [SEAL.]
HORATIO W. HEATH. [SEAL.]
GEORGE B. CHANDLER. [SEAL.]

Signed, sealed, and delivered in presence of—
GEO. H. CHANDLER.
HARRY E. LOVEREN.

Approved:
C. DOE,
Chief Justice of said Supreme Court of N. H.

22 A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond; which bond is on file in the office of the clerk of the supreme court of the State of New Hampshire within and for the county of Hillsborough.

[Seal Supreme Court New Hampshire.]

Attest: THOS. D. LUCE,
Clerk Supreme Court, County of Hillsborough.

23 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of New Hampshire, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the State of New Hampshire in which a decision could be had in or upon an indictment found by the grand jury at a term of the said supreme court holden at Nashua, in and for said county of Hillsborough and State of New Hampshire, against Clarence E. Collins, of Manchester, in said county of Hillsborough, petitioner for writ of error to the United States Supreme Court, at Washington, in the

District of Columbia, and the said State of New Hampshire appearing and opposing said petitioner for his writ of error, wherein was drawn in question the validity of a statute or law of said State of New Hampshire, on the ground of its being repugnant to the Constitution and laws of the United States, and the decision in and by said State court was in favor of the validity of such State law, and a manifest error hath happened, to the great damage of the said Clarence E. Collins, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the twelfth day of May, in the year of our Lord one thousand eight hundred and ninety-four.

Seal of Circuit Court New Hampshire.

FREMONT E. SHURTLEFF,
Clerk of the Circuit Court of the United States for the District of New Hampshire.

Allowed by—
C. DOE,
Chief Justice of the Supreme Court of the State of New Hampshire.

24 STATE OF NEW HAMPSHIRE, *Hillsborough,* } *ss:*

And now here the judges of the supreme court of the State of New Hampshire make return of this writ by annexing hereto and sending herewith, under the seal of the said supreme court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, Thomas D. Luce, clerk of said supreme court within and for the county of Hillsborough, have hereto set my hand and the seal of said court this twenty-first day of May, A. D. 1894.

[Seal Supreme Court New Hampshire.]

THOS. D. LUCE, *Clerk.*

Endorsed on cover: Case No. 15,598. New Hampshire supreme Court. Term No., 110. Clarence E. Collins, plaintiff in error, *vs.* The State of New Hampshire. Filed May 26th, 1894.

Nos. 17, 86, 87 and 88

Brief of Guthrie, Dale, &

OLEOMARGARINE CASES.

Supreme Court of the United State

of Veeder for C. J.

OCTOBER TERM, 1897.

Nos. 17, 86, 87, 88.

Filed Mar 2, 1898.

CLARENCE E. COLLINS,
Plaintiff in error,
vs.
THE STATE OF NEW HAMPSHIRE.
Error to the Supreme Court of the State of New Hampshire.
No. 17.

GEORGE SCHOLLENBERGER,
Plaintiff in error,
vs.
THE COMMONWEALTH OF PENNSYLVANIA.
Error to the Supreme Court of the State of Pennsylvania.
No. 86.

GEORGE E. PAUL,
Plaintiff in error,
vs.
THE COMMONWEALTH OF PENNSYLVANIA.
Error to the Supreme Court of the State of Pennsylvania.
No. 87.

J. OTIS PAUL,
Plaintiff in error,
vs.
THE COMMONWEALTH OF PENNSYLVANIA.
Error to the Supreme Court of the State of Pennsylvania.
No. 88.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR IN SUPPORT OF CONTENTION THAT THE OLEOMARGARINE ACTS OF NEW HAMPSHIRE AND PENNSYLVANIA ARE UNCONSTITUTIONAL IN SO FAR AS THEY AFFECT INTERSTATE COMMERCE.

WILLIAM D. GUTHRIE,
RICHARD C. DALE,
HENRY R. EDMUNDS,
ALBERT H. VEEDER,
Of counsel for plaintiffs in error.

Supreme Court of the United States.

OCTOBER TERM, 1897.

NOS. 17, 86, 87, 88.

CLARENCE E. COLLINS, *Plaintiff in error,*
vs.
THE STATE OF NEW HAMPSHIRE.
Error to the Supreme Court of the State of New Hampshire. — No. 17.

GEORGE SCHOLLENBERGER, *Plaintiff in error,*
vs.
THE COMMONWEALTH OF PENNSYLVANIA.
Error to the Supreme Court of the State of Pennsylvania. — No. 86.

GEORGE E. PAUL, *Plaintiff in error,*
vs.
THE COMMONWEALTH OF PENNSYLVANIA.
Error to the Supreme Court of the State of Pennsylvania. — No. 87.

J. OTIS PAUL, *Plaintiff in error,*
vs.
THE COMMONWEALTH OF PENNSYLVANIA.
Error to the Supreme Court of the State of Pennsylvania. — No. 88.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR IN SUPPORT OF CONTENTION THAT THE OLEOMARGARINE ACTS OF NEW HAMPSHIRE AND PENNSYLVANIA ARE UNCONSTITUTIONAL IN SO FAR AS THEY AFFECT INTERSTATE COMMERCE.

STATEMENT OF FACTS AND ERRORS ASSIGNED.

The questions in these cases arise under the commerce clause of the Constitution of the United States, and involve the constitutionality of certain provisions contained in the so-called oleomargarine acts of New Hampshire and Pennsylvania.

In the first case, *Collins* v. *New Hampshire* (No. 17), the statute of New Hampshire (Public Stats., 1891, *c.* 127, *s.* 19) provided, among other things, that it should be unlawful and criminal—

"to sell, offer for sale, or keep in possession with intent to sell, in this state, any substance or compound made wholly or in part of fats, oils, or grease, not produced from milk or cream, in imitation of, or as a substitute for, butter or cheese, unless the same is contained in tubs, firkins, boxes, or other packages, each of which has upon it, to indicate the character of its contents, the words 'Adulterated Butter,' 'Oleomargarine,' or 'Imitation Cheese' as the case may be, in plain Roman letters not less than one half inch in length, and so placed and made or attached that they can be readily seen and read and cannot be easily defaced; and if the substance or compound is a substitute for cheese, unless the cloth surrounding it has a like inscription; *and if it is a substitute for butter, unless it is of a pink color.* When any such substance or compound is sold in less quantities than the original packages contain, the seller shall deliver to the purchaser with it a label bearing the words indicating its character as above, in like letters."

In order to render oleomargarine pink, it must be artificially colored.

The plaintiff in error, Collins, complied with all the provisions of this act except that the oleomargarine sold by him was not artificially colored pink. The facts found upon the trial of the case were that Collins, at the time of the alleged offense, was the agent at Manchester, New Hampshire, of Swift & Company, a corporation having its principal place of business in Chicago, Illinois, and there engaged in the manufacture and sale of oleomargarine (record, pp. 4, 7); that as such agent he sold in Manchester, at wholesale, at the store of said Swift & Company, a package weighing ten pounds, in the form in which it was packed in Chicago by his principal, containing the oleomargarine of

commerce as the same is known and dealt in as an article of food, and in the form of package and with the labels required by the act of Congress of August 2, 1886, c. 840, 24 Stat., 209, entitled "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine." In addition to the express finding that the plaintiff in error had complied with all the provisions of the New Hampshire statute as indicating the true character of the article sold, etc., except only that the contents had not been colored pink, it was further found that Swift & Company had paid the special United States tax imposed by the act of Congress, and had complied with all the requirements of that act in respect of the manufacture and sale at wholesale of oleomargarine, the character and weight of packages used in interstate commerce and their labeling or stamping in order to prevent deception.

The plaintiff in error claimed that, upon these facts, he was not liable to punishment, because the statute of New Hampshire was in contravention of the Constitution of the United States and its amendments and of the laws of Congress, and excepted to the adverse ruling of the trial court thereon. A verdict of guilty was returned, and the questions of law arising on the indictment were reserved for the determination of the court *in banc*, where the exceptions were overruled and a fine of one hundred dollars and costs was imposed (record, p. 5). The opinion of the Supreme Court of New Hampshire, per DOE, C. J., is as follows (p. 7):

"The need of a uniform operation of Federal law in all the

States and the apparent degree of uncertainty as to the view the federal court may take of this statute are reasons for a disposition of the case that will furnish an opportunity to carry the Federal question to the only tribunal by which that question can be settled." (Record, pp. 5, 7.)

A writ of error was thereupon allowed and the bond on writ of error duly given, and the case is thus brought to this Court (p. 1).

In the cases of *Schollenberger* v. *Pennsylvania* and *Paul* v. *Pennsylvania* (Nos. 86, 87 and 88), the Pennsylvania statute of 1885 was held to apply not only to the local manufacture and sale of oleomargarine, but also to prohibit the sale or offering for sale or the possession of oleomargarine with intent to sell the same as an article of food, although manufactured in another state and sold by the importer or agent of the non-resident manufacturer in the original package, the package being unbroken and plainly labeled "Oleomargarine" and no deception or fraud of any kind being practised.

The Pennsylvania act of May 21, 1885 (L. 1885, p. 22), provides as follows:

"That no person, firm, or corporate body, shall manufacture out of any oleaginous substance or any compound of the same, other than that produced from unadulterated milk or of cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk, or cream from the same, or of any imitation or adulterated butter or cheese, nor shall sell or offer for sale, or have in his, her or their possession with intent to sell the same as an article of food."

Violations of this act are made misdemeanors, punishable by fine and imprisonment.

It appeared in all of the Pennsylvania cases, that the plaintiffs in error were indicted and convicted of the crime of selling oleomargarine in the original package

shipped from Rhode Island or Illinois. There was no proof of fraud or imitation of any kind, by coloration or otherwise; the fact that the article was genuine oleomargarine and not butter was made known to each purchaser; and there was no attempt or purpose to sell the article as butter, nor any understanding on the part of the purchaser that he was buying anything but oleomargarine (Schollenberger record, pp. 12–14; G. E. Paul record, pp. 11–13; and J. O. Paul record, pp. 12–14).

Schollenberger was the agent of the Oakdale Manufacturing Company, of Providence, Rhode Island, and as such agent was engaged in business in the city of Philadelphia as a wholesale dealer in oleomargarine, and had paid the United States Internal Revenue tax on such business under the act of Congress. He was not engaged in any other business. On October 2, 1893, the Oakdale Manufacturing Company packed and shipped to him from Providence a tub of oleomargarine containing forty pounds. The evidence showed that the tub was of such form, size and weight as is ordinarily used by producers and shippers in the customary course of actual commerce as regulated by the act of Congress. Schollenberger sold the oleomargarine in the original package with the seals, marks, stamps and brands unbroken, as packed by the manufacturers in Rhode Island and thence transported to Philadelphia and delivered to him by the carrier, and the package was not broken or opened on his premises, and as soon as sold was removed from the premises by the purchaser.

In the *Paul* cases (Nos. 87 and 88) the facts were the same, except that the original packages contained

ten pounds of oleomargarine, and that the Pauls were acting as agents of Messrs. Braun & Fitts, who are manufacturers and shippers at Chicago, Illinois (G. E. Paul record, p. 12; J. O. Paul record, p. 12).

The Supreme Court of Pennsylvania held the act of 1885 to apply even if the oleomargarine in question was an article of interstate commerce, and said "our statute is directed especially against the sale of oleomargarine as an article of food." The court expressly declined to consider whether oleomargarine was a lawful article of commerce, holding that to be a legislative question. As stated in the opinion in the *J. O. Paul* case (No. 88, p. 21): "Whether the trade in oleomargarine is injurious and should be restricted is a question that has been decided for us. It has been declared injurious." It seemed to be the theory of the court below that the legislature could destroy the traffic in any article of interstate commerce by a simple declaration that it is injurious. The decisions of the Supreme Court of Pennsylvania will be found in the Schollenberger record (No. 86), at p. 18; also, 170 Pa. St., 296; in the G. E. Paul record (No. 87), at p. 16; also, 170 Pa. St., 296; and in the J. O. Paul record (No. 88), at p. 17; also, 170 Pa. St., 284.

The Pennsylvania statute involved in cases Nos. 86, 87 and 88 was before this Court in *Powell* v. *Pennsylvania* 127 U. S., 678, decided at the October Term, 1887, and was upheld as a legitimate exercise of police power with respect to local manufacture and internal commerce. No point was then involved or presented to the Court as to the effect of the act upon interstate commerce or upon sales in original packages of commerce. The

decision related solely to the police power as to local trade within the state, and the provision of the federal constitution granting exclusive power to Congress to regulate commerce among the states was not invoked. The case turned on the bearing of the fourteenth amendment and its provision requiring due process of law. It is plain that although a statute with reference to local traffic and trade passed under the police power of a state might not conflict with the fourteenth amendment, yet that the same statute in so far as it attempted to regulate interstate commerce might conflict with the commerce clause. The point in the one case is entirely distinct from that involved in the other.

The latest oleomargarine case before the Court was *Plumley* v. *Massachusetts*, 155 U. S., 461, decided at the October Term, 1894. This, unlike the *Powell* case, arose under the commerce clause of the federal constitution. The statute of Massachusetts prohibited the sale of oleomargarine artificially colored so as to cause it to look like yellow butter; but it was expressly provided "That nothing in this act shall be construed to prohibit the manufacture or sale of oleomargarine in a separate and distinct form, and in such manner as will advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter." In upholding the act as a proper exercise of the police power, Mr. Justice HARLAN emphasized the fact that the statute of Massachusetts did not prohibit the sale of all oleomargarine, but only such as had been artificially colored in imitation of yellow butter, and that, if free from coloration or ingredient that caused it to look like butter,

the right to sell it without fraud or deception was neither restricted nor prohibited. To quote the language of the opinion (p. 468):

"If any one thinks that oleomargarine, not artificially colored so as to cause it to look like butter, is as palatable or as wholesome for purposes of food as pure butter, he is, as already observed, at liberty under the statute of Massachusetts to manufacture it in that State or to sell it there in such manner as to inform the customer of its real character."

A very clear and succinct statement of the scope and effect of the decision in the *Plumley* case will be found in *Ex parte Scott*, 66 Fed. Rep., 45, 49:

"I will append here a notice of the recent decision of the United States supreme court in the case of *Plumley* v. *Com.*, 15 Sup. Ct., 154. In that case the court had under review a statute of Massachusetts prohibiting the sale in that state of oleomargarine if it was got up 'in imitation of yellow butter,' but allowing it to be sold 'in a separate and distinct form, and in such a manner as will advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter.' The supreme court held that, though the act would have been invalid if it had prohibited the sale of oleomargarine generally in undisguised form, yet that so far as it prohibited the coloring of oleomargarine yellow, so as to imitate butter, and thereby deceive the consumer, the law was pro tanto valid. Even in restricting its decision to the mere yellowing of oleomargarine, the court was held by three of the justices to have gone too far. The court were unanimous as to the invalidity of any state law which should inhibit the sale within its borders of oleomargarine, when prepared, labeled, and sold as such, without deceit or fraud."

The Pennsylvania statute denies to the plaintiffs in error the right to sell oleomargarine as such in its natural state without fraud or deception and with full disclosure, and declares them criminals and imposes upon them the penalties of infamous crimes for attempting to trade in a wholesome and nutritious article of food everywhere recognized as a legitimate article of commerce.

The power of the states to regulate the sale of oleomargarine, to prevent artificial coloring calculated to deceive, to require labels, to punish deception, etc., is not challenged. The question in the Pennsylvania cases is whether the states, in the exercise of their police power, can entirely exclude, prohibit and destroy all commerce between the states in any article designed to take the place of butter or cheese as an article of food. This necessarily involves the broader question as to whether the police power can uphold state legislation which prevents and destroys interstate commerce in any article designed and fit to take the place of any other article of foods and sold for what it is, without fraud or deception or imitation, and with full disclosure to the purchaser.

Assignment of Errors.

The assignments of error are substantially the same in each case (Collins record, p. 10; Schollenberger record, pp. 19, 20; G. E. Paul record, pp. 18, 19; J. O. Paul record, pp. 23, 24); and, although made full and elaborate with reference to the decisions of the state courts and designed to cover every point involved, the questions at issue may, in view of the ruling in the *Powell* case, all be considered under the one vital and controlling proposition that the acts of New Hampshire and Pennsylvania unconstitutionally interfere with interstate trade and traffic and encroach upon the exclusive power of Congress to regulate commerce. The questions raised by the numerous assignments of error, and all the questions that

may arise in the progress of the discussion are subsidiary to and necessarily involved in the determination of this single proposition. Its maintenance must result in the invalidity of the statutes of New Hampshire and Pennsylvania now before the Court in so far as they seek to regulate and prohibit commerce among the states.

Subsequent to the judgment and sentence in the *Collins* case and the writ of error to the New Hampshire Court, the statute under which the conviction was had was repealed, undoubtedly because too severe in its operation, and the Massachusetts statute was substituted in its place. In New Hampshire the rule of the common law has been changed, and the repeal of a penal statute does not operate as a remission of penalties or a release from prosecution or enforcement of a judgment.

The New Hampshire statutes provide (P. S. N. H. 1891, c. 2, sec. 36, p. 51):

"No suit or prosecution, pending at the time of the repeal of an act, for any offense committed or for the recovery of a penalty or forfeiture incurred under the act so repealed, shall be affected by such repeal."

See, also,

United States v. *Reisinger*, 128 U. S., 398, 401;
State v. *Kansas City*, &c., 32 Fed. Rep., 722, 725;
Railway v. *Twombly*, 100 U. S., 78, 91.

ARGUMENT.

(I.) The exclusive jurisdiction and control of Congress over the subject matter of commerce among the several states.

(II.) Oleomargarine is a recognized article of commerce, and as such the states have no power to prohibit or arbitrarily restrict trade therein.

(III.) The police power of the states in respect of local and interstate commerce.

(IV.) The prohibition of the Pennsylvania statute is an unconstitutional interference with interstate commerce.

(V.) The requirement of the New Hampshire statute is likewise an unconstitutional interference with interstate commerce.

I.

THE EXCLUSIVE JURISDICTION AND CONTROL OF CONGRESS OVER THE SUBJECT MATTER OF COMMERCE AMONG THE STATES.

It may be appropriate to refer to some of the leading decisions of the Court as to the scope and operation of the commerce clause. The Court is perfectly familiar with the whole subject in its general aspects, for questions arising under this clause are being constantly presented for adjudication; but, even if superfluous, the argument may seem more complete and the sequence more logical if some of the fundamental principles are recalled at the outset. The difficulty of the subject does not spring from any uncertainty as to these principles, but from their proper application to the individual case presented. The problem in each case is to determine whether the particular legislation of a state does, as matter of fact, encroach upon the exclusive power of Congress to regulate commerce and interfere with freedom of trade among the states.

In referring to the exclusive power to regulate commerce among the several states vested in Congress by Article 1, Section 8, of the Constitution of the United

States, Mr. Justice CATRON said in the *License Cases*, 5 How., 504, 599:

"The power given to Congress is unrestricted, and broad as the subjects to which it relates; it extends to all lawful commerce with foreign nations, and in the same terms to all lawful commerce among the States."

And Mr. Justice STRONG said in *Railroad Co.* v. *Husen*, 95 U. S., 465, 469:

"Whatever may be the power of a State over commerce that is completely internal, it can no more prohibit or regulate that which is inter-state than it can that which is with foreign nations. Power over one is given by the Constitution of the United States to Congress in the same words in which it is given over the other, and in both cases it is necessarily exclusive."

Mr. Chief Justice FULLER recapitulates the whole doctrine in one paragraph of the opinion *In re Rahrer*, 140 U. S., 545, 555:

"The power of Congress to regulate commerce among the several States, when the subjects of that power are national in their nature, is also exclusive. The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraint. Therefore, it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several States. *Robbins* v. *Shelby Taxing District*, 120 U. S., 489. And if a law passed by a State in the exercise of its acknowledged powers comes into conflict with that will, the Congress and the state cannot occupy the position of equal opposing sovereignties, because the Constitution declares its supremacy and that of the laws passed in pursuance thereof. *Gibbons* v. *Ogden*, 9 Wheat., 1, 210. That which is not supreme must yield to that which is supreme. *Brown* v. *Maryland*, 12 Wheat., 419, 448."

In *Scott* v. *Donald*, 165 U. S., 58, 91, the South Carolina dispensary law was held invalid upon the ground, as stated in the headnote, that the act "recog-

nizes liquors and wines as commodities which may be lawfully made, bought and sold, and which must therefore be deemed to be the subject of foreign and interstate commerce, and is an obstruction to and interference with that commerce, and must, as to those of its provisions which affect the plaintiffs, stand condemned." Mr. Justice SHIRAS reviewed all the leading cases, and said:

"So long, however, as state legislation continues to recognize wines, beer and spirituous liquors as articles of lawful consumption and commerce, so long must continue the duty of the Federal courts to afford to such use and commerce the same measure of protection, under the Constitution and laws of the United States, as is given to other articles.[1]

"We cheerfully concede that the law in question was passed in the *bona fide* exercise of the police power. * * But, as we have had more than one occasion to observe, our willingness to believe that this statute was enacted in good faith, and to protect the people of the State from the evils of unrestricted importation, manufacture and sale of ardent spirits, cannot control the final determination whether the statute, in some of its provisions, is not repugnant to the Constitution of the United States."

It is not enough that an article which is the subject of interstate commerce should be allowed to enter the interior of a state. The non-interference by a state with the sale of such an article at wholesale or retail is as necessary to free intercourse in trade between residents of different states as is the right to cross the state boundary; and a denial of the right of sale is as much an interference with interstate commerce as if transportation itself be stopped at the state line. In the leading case of *Brown* v. *Maryland*, 12 Wheat., 419, 446, Mr. Chief Justice MARSHALL, discussing in a tax case the extent of

[1] See also *Vandercook* v. *Vance*, 80 Fed. Rep., 786.

the power of Congress to regulate interstate commerce, said:

"The power is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a State, but must enter its interior. * * If this power reaches the interior of a State, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse: one of its most ordinary ingredients is traffic. *It is inconceivable, that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported?* Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce."

In *Brown* v. *Houston*, 114 U. S., 622, 630, Mr. Justice BRADLEY said:

"According to the rule laid down in *Cooley* v. *Board of Wardens of Philadelphia*, 12 How. 299, 319, the power of Congress is exclusive wherever the matter is national in its character or admits of one uniform system or plan of regulation; and is certainly so far exclusive that no State has power to make any law or regulation which will affect the free and unrestrained intercourse and trade between the States, as Congress has left it, or which will impose any discriminating burden or tax upon the citizens or products of other States, coming or brought within its jurisdiction. * * So long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its will that commerce shall be free and untrammeled; and any regulation of the subject by the States is repugnant to such freedom."

See also, *Henderson* v. *Mayor*, 92 U. S., 259, 268;
People v. *Compagnie*, 107 U. S., 59, 63;
Bowman v. *Railway Co.*, 125 U. S., 465, 490;
Leisy v. *Hardin*, 135 U. S., 100, 119;

Minnesota v. *Barber*, 136 U. S., 313, 320;
Brimmer v. *Rebman*, 138 U. S., 78, 83;
Voight v. *Wright*, 141 U. S., 62, 66.[1]

The traffic and trade in oleomargarine are clearly such as not only admit of but require one uniform system or plan of regulation, for it is manufactured in only a few of the states, while the demand and market for it exist everywhere. It is indisputably a commercial commodity. There can be no freedom of trade in any article of commerce if one or more states can wholly exclude it, while other states admit it freely or under regulations aimed only at deception. No reasonable degree of freedom of commerce can exist if one state can prohibit and another compel artificial coloring of any particular commodity. "The oppressed and degraded state of commerce" will be restored, and "commercial anarchy and confusion" must result, if one or more states can wholly prohibit trade in a wholesome article of food sold without fraud, upon the pretense that it is acting under its police power.

The provisions of the Act of Congress of August 2, 1886, constitute a complete system for the regulation of the interstate traffic and trade in oleomargarine, for the exclusion of deleterious ingredients, and for the prevention of fraud. The object of the act as expressed in its title was not merely to tax, but to regulate, viz. (24 Stat., 505):

"An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine."

This act of Congress was said in the *Plumley* case

[1] *In re Beine*, 42 Fed. Rep., 545; *In re Gooch*, 44 *Ibid*, 276; *In re McAllister*, 51 *Ibid*, 282; *In re Sanders*, 52 *Ibid*, 802; *In re Ware*, 53 *Ibid*, 783; *In re Minor*, 69 *Ibid*, 233; *State of Iowa* v. *McGregor*, 76 *Ibid*, 956; *In re Leboit*, 77 *Ibid*, 587; *In re Thomas*, 82 *Ibid*, 304; *Sawrie* v. *State of Tennessee*, 82 *Ibid*, 615.

not to have been intended as an interference with the power of the states to prevent deception or fraud or to give authority to disregard any regulation which a state might lawfully prescribe; but regulation, of course, does not involve prohibition (*Railroad Commission Cases*, 116 U. S., 307, 331).

The act imposes a tax of $600 upon manufacturers, of $480 upon wholesale dealers, of $48 upon retail dealers, and of two cents per pound upon all sales of oleomargarine; and under this law the federal government annually derives a very large revenue.[1] Have the states power to prohibit interstate commerce in what the federal government has licensed? Can the state by this method of prohibition deprive the federal government of a source of revenue and a tax imposed and collected upon a legitimate article of commerce? If so, for example, the immense internal revenue from tobacco might be swept away upon the plea that cigarettes were injurious to health and that such "a statute was aimed at the suppression of an evil of most pronounced character."[2]

Sections 6 and 14 of the act provide:

"That all oleomargarine shall be packed by the manufacturer thereof in firkins, tubs, or in other wooden packages not before used for that purpose, each containing not less than ten pounds, and marked, stamped, and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe; and all sales made by manufacturers of oleomargarine, and wholesale dealers in oleomargarine shall be in original stamped packages. Retail dealers in oleomargarine must sell only

[1] The official reports of the Secretary of the Treasury show: Tax receipts from the manufacture and sale of oleomargarine in the United States under act of Congress of August 2, 1886, in 1887, $723,948.04 (Rep., 1887, p. 368); in 1888, $864,139.88 (Rep., 1888, p. 348); in 1889, $894,247.91 (Rep., 1891, p. 456); in 1890, $786,291.72 (Rep., 1890, p. 352); in 1891, $1,077,924.14 (Rep., 1891, p. 456); in 1892, $1,266,326 (Rep., 1892, p. 451); in 1893, $1,670,643.50 (Rep., 1893, p. 639); in 1894, $1,723,479.90 (Rep., 1894, p. 702); in 1895, $1,409,211.18 (Rep., 1895, p. 476); total amount during nine years, $10,416,212.27.

[2] *Sawrie* v. *State of Tennessee*, 82 Fed. Rep., 615, 623.

from original stamped packages, in quantities not exceeding ten pounds, and shall pack the oleomargarine sold by them in suitable wooden or paper packages, which shall be marked and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe. * *

"The Commissioner may also decide whether any substance made in imitation or semblance of butter, and intended for human consumption, contains ingredients deleterious to the public health; but in case of doubt or contest his decisions in this class of cases may be appealed from to a board hereby constituted for the purpose, and composed of the Surgeon-General of the Army, the Surgeon-General of the Navy, and the Commissioner of Agriculture; and the decisions of this board shall be final in the premises."

Other sections carefully provide for the enforcement of the provisions of the act, and furnish a complete system for protecting the public in wholesale and retail dealings against fraud and deception, as well as against "ingredients deleterious to the public health." There can be no fraud and no deception in any form if the act of Congress be complied with. In each of the cases at bar, it was established that all the requirements of the act of Congress had been complied with, and this reasonably implies the finding that the oleomargarine did not contain "ingredients deleterious to the public health" in the absence of all proof to the contrary.

II.

OLEOMARGARINE IS A RECOGNIZED ARTICLE OF COMMERCE, AND AS SUCH THE STATES HAVE NO POWER TO PROHIBIT OR ARBITRARILY RESTRICT TRADE THEREIN.

The ground upon which a state may in a proper case, under the police power, regulate or restrict sales of commodities without unlawfully interfering with interstate

commerce is nowhere more clearly stated than by Mr. Justice CATRON in the *License Cases*, 5 How., 504, 600, where he said:

"If, from its nature, it does not belong to commerce, or if its condition, from putrescence or other cause, is such when it is about to enter the State that it no longer belongs to commerce, or, in other words, is not a commercial article, then the State power may exclude its introduction. And as an incident to this power, a State may use means to ascertain the fact. And here is the limit between the sovereign power of the State and the federal power. That is to say, that which does not belong to commerce is within the jurisdiction of the police power of the State; and that which does belong to commerce is within the jurisdiction of the United States."

And by Mr. Justice BRADLEY in *Crutcher* v. *Kentucky*, 141 U. S., 47, 61:

"It is only such things as are clearly injurious to the lives and health of the people that are placed beyond the protection of the commercial power of Congress."

In *Bowman* v. *Chicago, &c., Railway Co.*, 125 U. S., 465, 501, Mr. Justice FIELD said:

"What is an article of commerce is determinable by the usages of the commercial world, and does not depend upon the declaration of any State."

As the states cannot regulate commerce, for the reason that such regulation is within the exclusive jurisdiction of Congress, it must follow that they cannot usurp this federal jurisdiction by merely declaring an article of commerce not to be a commercial commodity because the local or provincial policy of the state or the interests of a majority of the voters might be subserved thereby (*Leisy* v. *Hardin* 135 U. S., 100, 123, 125; *Sawrie* v. *State of Tennessee*, 82 Fed. Rep., 615, 622).

Oleomargarine has been a constant source of litigation, and innumerable cases concerning it have been before the

courts; but in no case has it ever been established that as an article of food, if properly manufactured, it was deleterious or injurious to health. The only ground assigned in support of the decisions sustaining the various stringent enactments seeking to fetter the trade, has been deception in fraudulently selling oleomargarine for butter, and the only evil complained of or aimed at was successful competition with butter.

The fact that oleomargarine, as recognized and taxed by the act of Congress, is a legitimate article of food in general use, must be deemed conclusively established; certainly so in the absence of proof to the contrary. And it is not doubted that the Court will take judicial notice of the fact, as a matter of common and scientific knowledge, that oleomargarine is not injurious to health (*Brown* v. *Piper*, 91 U. S., 37, 42; *King* v. *Gallun*, 109 U. S., 99, 102; *Phillips* v. *Detroit*, 111 U. S., 604, 606).[1]

In none of the cases at bar was any attempt made to prove that the oleomargarine sold by the plaintiffs in error was in the slightest degree deleterious or injurious to health. In *Powell* v. *Pennsylvania*, 127 U. S., 678, 681, decided in the year following the Congressional enactment of August 2, 1886, the accused offered to prove, by a scientist who saw the article manufactured, the wholesome character of oleomargarine, but the evidence was rejected as immaterial. In *Plumley* v. *Massachusetts*, 155 U. S., 461, 465, the accused offered to prove that oleomargarine was a "wholesome, nutritious, palatable article of food." This was held immaterial, and rightly so held, for the fact that it was a proper and legiti-

[1] Encyclopædia Britannica, vol. IV, p. 592.

mate article of food was already conclusively evinced by the act of Congress aforementioned, and also by the statute of Massachusetts which permitted the fullest traffic in it, "if free from coloration or ingredient that causes it to look like butter," coupled with the requirement that its sale should be "in a separate and distinct form, and in such manner as will advise the consumer of its real character." In the Pennsylvania cases at bar, the state could not and did not dispute the wholesome character of oleomargarine properly manufactured.

Mr. Chief Justice FULLER said in the *Plumley* case, 155 U. S., 461, 480:

"It cannot be denied that oleomargarine is a recognized article of commerce, and moreover, it is regulated as such, for revenue purposes, by the act of Congress of August 2, 1886, C. 840, 24 Stat., 209; *United States* v. *Eaton*, 144 U. S., 677."

In *Ex parte Scott*, 66 Fed. Rep., 45, 48, decided shortly after the decision in the *Plumley* case, Hughes, D. J., said:

"It is a fact of common knowledge that oleomargarine has been subjected to the severest scientific scrutiny, and has been adopted by every leading government in Europe, as well as America, for use by their armies and navies. Though not originally invented by us, it is a gift of American enterprise and progressive invention to the world. It has become one of the conspicuous articles of interstate commerce, and furnishes a large income to the general government annually. Its chemical properties and preparation are such that it is adopted for the use of armies and navies of the great nations as more desirable and safe than to run the risk of rancid butters and animated cheeses. It is entering rapidly into domestic use, and the trade in oleomargarine has become large and important. The attention of the national government has been attracted to it as a source of revenue. Its manufacture and sale have been made the subject of careful regulation by Congress, and the national revenue derived from it is considerable. Manufacturers pay a tax of $600 per annum; whole-

sale dealers, $480; and retail dealers, $48. These petitioners had paid these taxes to the United States, which were heavy, and were doing business under the imprimatur of the national government; and it was for doing that business that they were arrested, tried, and jailed in this city of Norfolk. State legislation against it is therefore regarded as invidious by the national authorities, and the right of dealing in it will not be allowed by them to be capriciously overthrown."

In Tiedeman's Limitation of Police Power (p. 296) the author says:

"Although there has been some attempt made to show that this butter substitute is unwholesome as food, it seems now to be established by the most thorough chemical analyses, that there is no unwholesome ingredient in unadulterated oleomargarine."

In the "Report of the Commissioner of Internal Revenue for 1893" (pp. 171, 179, 180) the following will be found:

"This product has become a recognized article of food, and its manufacture one of the established industries of the country. There is in nearly all the states an increasing demand for it under its proper name, and by persons fully informed as to the nature of the substance. While it is used as a substitute for butter, for which it is intended, and comes into competition with the lower grades of that article, its production and sale have not, as shown by commercial reports and statistics, reduced the price of the higher grades of butter. The most reliable writers in this country on food products, and those who have given the subject careful study, state that oleomargarine, carefully and properly prepared, is a healthful article of diet and a wholesome substitute for butter, and can be furnished at less cost. * * The demand for it as a food product has become so universal that, in my opinion, opportunity should be offered for its legitimate sale in any community where it is wanted by consumers."[1]

In Vol. 134 of the "Journal of the Franklin Institute" (pp. 190–219) Prof. Caldwell, of Cornell University, voices the same sentiment:

"Under such restrictions it seems to me that the trade in this

[1] *Heath* v. *Wallace*, 138 U. S., 573, 584; *Kimmish* v. *Ball*, 129 U. S., 217, 220.

article might safely be left to itself, and that it might be a blessing to the community as a whole, in supplying at low prices a savory substitute for butter, far better in quality than most of that which the poorer classes have to eat, if they can get only genuine butter; and for those who can afford to pay for good butter, the opportunity to get it will be better, for dairymen will be obliged to make good butter if they make it at all."

Commercial intercourse and trade in oleomargarine as an article of commerce are not only recognized by Congress, but they are expressly sanctioned by the legislation of most of the states. It would be an extraordinary contention that oleomargarine is not, at the present time, a legitimate and recognized article of commerce, when nearly every state of the union now regulates and permits its sale. The regulations in many instances are unreasonably and needlessly severe; yet the fundamental fact remains that almost every state recognizes oleomargarine as a commercial and wholesome commodity and expressly permits its sale as such. For example, the Court will recall the provision of the Massachusetts Act:

"*Provided*, That nothing in this act shall be construed to prohibit the manufacture or sale of oleomargarine in a separate and distinct form, and in such manner as will advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter."

This was clearly a recognition of the fact that oleomargarine is a commercial commodity. And when it is found that this proviso appears almost word for word in the legislation of seventeen other states and that in the legislation of twenty-one states, where this provision is not found, sales are permitted under regulations against deception, the conclusion would seem to follow, as of course, that the article has a legitimate commercial character, and that a state can

not, by the mere declaration of its will, take away that character and ordain that it shall no longer be an article commerce.[1]

To slightly paraphrase the language of Mr. Justice SHIRAS in *Scott* v. *Donald*, 165 U. S., 58, 91:

"So long, however, as state legislation continues to recognize [packages of oleomargarine] as articles of lawful consumption and commerce, so long must continue the duty of the Federal courts to afford to such use and commerce the same measure of protection, under the Constitution and laws of the United States, as is given to other articles."

The Supreme Court of Pennsylvania and some other courts have assumed that the right to invoke the protection of the commerce clause of the Federal Constitution depended upon the size of the package, and whether the importer or trader is engaged in wholesale or retail business. This theory is erroneous. It springs from a narrow and literal interpretation of some expressions used in opinions of this Court. *Qui haeret in litera haeret in cortice.* The true and sound doctrine is undoubtedly that the size of the package and whether sold at wholesale or retail is wholly immaterial. The real test is its character as an article of commerce, and not its size or value. If it be an article of lawful commerce and consumption, the smallest package is entitled to freedom of trade untrammeled by taxation or by burdensome and needless regulations.

Certainly it cannot be maintained that the efficacy of the commerce clause ceases as soon as bulk is broken, and that the Constitution protects sales at wholesale but not at retail. If this were so, the guaranty of immunity

[1] See appendix for a reference to the legislation of the various states.

from state interference in interstate commerce would be of little value. Take the instance of dressed beef involved in *Minnesota* v. *Barber*[1] and *Brimmer* v. *Rebman*.[2] A carload of beef is shipped from one state to another, containing a number of carcasses or quarters. Is the protection of the federal guaranty limited to the carload, or carcass, or quarter? Is the importer or his agent limited to sales at wholesale, and can the state then prevent him from selling or another from purchasing at retail? Can it be supposed that the Court intended that the Minnesota statute should be held invalid only so far as it applied to sales of fresh meats in the original packages in which they had been shipped into the state? Has a state power to forbid entirely the sales of fresh meat brought from another state after it has been taken from the refrigerating car, or other original package, and is it only under the protection of the commerce clause while it remains in the car, and merely to that extent? Could the sale of sugar, coffee, tea, or tobacco, imported from abroad, be thus trammeled? If it could, the value of any commodity could be completely destroyed; for, of course, the continuance of the right to sell "is indispensable to its value" even in the hands of the importer or original holder.

The extreme to which courts have gone may be evidenced by the recent decision in the case of *Armour Packing Co.* v. *Snyder*, 84 Fed. Rep., 136, 138, involving the validity of the Minnesota statute, which requires oleomargarine to be artificially colored pink and which act was copied from the New Hampshire statute. The act was

[1] 136 U. S., 313. [2] 138 U. S., 78.

held not to encroach upon the domain of the national government upon the following reasoning:

"It is not invalid as interfering with the exclusive power of congress to regulate commerce among the several states. The act does not interfere with oleomargarine so long as it remains an article of commerce, and is being handled or stored as such. It is only after it has ceased to be an article of commerce, and becomes a part of the mass of the property of the state, and as such is being sold, or kept and exposed for sale, that it comes under this act; which makes no distinction in favor of the article manufactured in this state, or against that which is brought from other states."

The prevalent error as to the meaning and scope of the expression "original package" results from confounding, with cases involving taxation, those which involve the extent and validity of a particular application of the police power. It was held in *Brown* v. *Maryland*[1] when the bulk of an imported article is broken and "has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state," and quite properly so. It then came within the reach of the power of taxation, as any other property. But it was not held, and this Court has never held, that the breaking of bulk deprives the articles of the protection and benefit of the commerce clause. It has never been decided that the commerce clause protects only the dealer at wholesale, and that states are at liberty to prohibit the sale at retail of recognized and legitimate articles of commerce imported from other states, or other countries, so soon as the bulk of the original package is broken.

A study of some of the cases in the lower federal

[1] 12 Wheat., 419.

courts which are said to turn upon the original package doctrine reveals, therefore, a fundamental misconception of the decisions of this Court (*e. g.*, *Armour Packing Co.* v. *Snyder*, 84 Fed. Rep., 136; *Guckenheimer* v. *Sellers*, 81 Fed. Rep., 997). This misconception is that the commerce clause protects only so long as the article remains unbroken in the original package of interstate commerce, and ceases to protect the contents when the package is broken. When this occurs, it is said that the state may exercise its police power over the same article to an extent which it could not do before. In other words, the idea seems to be that the federal power is spent when under its protection the "original package" has been convoyed into the hands of the consignee, who is usually a wholesale dealer, and that, if he breaks bulk, he thereby forfeits the federal protection, and thereafter holds subject to the power of a state to prohibit the sale at retail and to destroy commercial value.

The term "original package" was first employed by this Court in *Brown* v. *Maryland*, 12 Wheat., 419, 441, where Chief-Justice MARSHALL said:

> "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution."

It is here very clear that there was no intention to make the original package a test of the commercial character of the article. No question of this kind was involved.

The commercial character was admitted, and the question was at what point the prohibition upon the state to tax imports ceased to operate. To tax imports incidentally as a part of the general property of the state from which they are undistinguishable is entirely different from an attempt to tax imports specifically as such, which was the point presented in *Brown* v. *Maryland*. The states cannot tax imports specifically, even though the original packages have been broken.[1] Nor can it be said that there is a difference in respect of foreign commerce, because that was the point involved in *Brown* v. *Maryland*. No state can close to a citizen of another state a market which it must open to the foreigner. As Mr. Justice BRADLEY said in *Crutcher* v. *Kentucky*, 141 U. S., 47, 57:

"It has frequently been laid down by this court that the power of Congress over interstate commerce is as absolute as it is over foreign commerce."

The question as to whether or not an article is a subject of lawful commerce, and the converse question as to whether or not an article is a subject of a lawful exercise of the police power, cannot depend upon its form or casual quantity. An article commercial in its nature, as determined by reference to commercial usage, does not lose this natural character at any time; and any particular article which, according to the same test, is not in its nature commercial, cannot become so by being shipped across the boundary of a state.

In the cases at bar, the original package was never broken, and it is a digression to argue this aspect of the

[1] See *In re May*, 82 Fed. Rep., 422; *Preston* v. *Finley*, 72 Fed. Rep., 850; *Emert* v. *Missouri*, 156 U. S., 296, 313.

question. The discussion, however, bears to some extent upon the views expressed by the Pennsylvania Supreme Court.

III.

The police power of the states in respect of local and interstate commerce.

The exercise of the police power by the state legislatures may come before this Court for adjudication in two aspects: the one with relation to matters wholly of local concern, such as internal traffic and trade, the other with relation to matters of national concern, which can only be regulated by one uniform system, such as commerce among the states. In the one class of cases, the question arises solely under the fourteenth amendment and its requirement of due process of law; in the other class, it arises under the commerce clause of the Constitution which was intended to secure and guarantee freedom of trade and untrammeled commercial intercourse among the several states. This Court has repeatedly recognized that, whatever may be the power of a state over manufacture and commerce that is completely internal, the local legislatures can never regulate or prohibit or interfere with interstate commerce. The one class of legislation may be within the sphere of state action, or what used to be termed state sovereignty; the other class of legislation is an encroachment upon the sphere and domain of the national government.

In *Brennan* v. *Titusville*, 153 U. S., 289, 299, Mr.

Justice BREWER, delivering the unanimous opinion of the Court, said:

"Even if those declarations had been the reverse, and the license in terms been declared to be exacted as a police regulation, that would not conclude this question, for whatever may be the reason given to justify, or the power invoked to sustain the act of the State, if that act is one which trenches directly upon that which is within the exclusive jurisdiction of the National Government, it cannot be sustained."

Mr. Justice HARLAN has said (*New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S., 650, 661) in discussing the powers of the states and speaking for the whole Court:

"Definitions of the police power must, however, be taken, subject to the condition that the State cannot, in its exercise, *for any purpose whatever*, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land."

The general principle is found most clearly stated in the oft-quoted language of Mr. Justice CATRON in the *License Cases*, 5 How., 504, 599, as follows:

"The assumption is, that the police power was not touched by the constitution, but left to the States as the constitution found it. This is admitted; and whenever a thing, from character or condition, is of a description to be regulated by that power in the State, then the regulation may be made by the State, and Congress cannot interfere. *But this must always depend on facts, subject to legal ascertainment, so that the injured may have redress.* And the fact must find its support in this, whether the prohibited article belongs to, and is subject to be regulated as part of, foreign commerce, or of commerce among the States."

As Mr. Justice MILLER said in *Henderson* v. *Mayor of N. Y.*, 92 U. S., 259, 271:

"This power, frequently referred to in the decisions of this court, has been, in general terms, somewhat loosely called the police power. It is not necessary for the course of this discussion to attempt to define it more accurately than it has been defined already. It is not necessary, because whatever may be the nature and extent

of that power, where not otherwise restricted, no definition of it, and no urgency for its use, can authorize a State to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution."

In *Railroad Co.* v. *Husen*, 95 U. S., 465, 473, Mr. Justice STRONG used the following language:

"The police power of a State cannot obstruct foreign commerce or inter-state commerce beyond the necessity for its exercise; and under color of it objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution. And as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion."

When a state legislature acts within its sphere of local concerns, every reasonable presumption is indulged by this Court in favor of the validity of the enactment; and it is now the settled rule of constitutional exposition that if a state, in enacting any law, may or may not be, according to circumstances, within the limits of legislative authority, the existence of the circumstances necessary to support the law is presumed. But no such presumption can be indulged when state legislation *prima facie* affects and encroaches upon commerce among the states. Then it must appear clearly and affirmatively that the local regulation is grounded in some fair necessity for the exercise of the police power and is a necessary provision for the protection of the community (Point II). It must be conclusively established, if an article be excluded, that it "no longer belongs to commerce, or, in other words, that it is not a commercial article." The protection or guaranty of the Federal Constitution is *general*, affecting the people of all the states; the police power of the state is *special*, affecting only the people of one state; and consequently,

whenever it appears *prima facie* that the special power encroaches upon the general power, the presumption must be in favor of the latter. Were it otherwise, the result would minimize the value of the federal pledge of freedom of commerce and vastly extend the power of the states. As Mr. Justice MATTHEWS said in *Bowman* v. *Railway Co.*, 125 U. S., 465, 494:

"If the State of Iowa may prohibit the importation of intoxicating liquors from all other States, it may also include tobacco, or any other article, the use or abuse of which it may deem deleterious. It may not choose, even, to be governed by considerations growing out of the health, comfort, or peace of the community. Its policy may be directed to other ends. It may choose to establish a system directed to the promotion and benefit of its own agriculture, manufactures or arts of any description, and prevent the introduction and sale within its limits of any or of all articles that it may select as coming into competition with those which it seeks to protect. The police power of the State would extend to such cases, as well as to those in which it was sought to legislate in behalf of the health, peace, and morals of the people."

To quote again from the opinion of Mr. Justice CATRON in the *License Cases*, 5 How., 504, 600:

"Upon this theory, the power to regulate commerce, instead of being paramount over the subject, would become subordinate to the State police power; for it is obvious that the power to determine the articles which may be the subjects of commerce, and thus to circumscribe its scope and operation, is, in effect, the controlling one. * * The same process of legislation and reasoning adopted by the State and its courts could bring within the police power any article of consumption that a State might wish to exclude, whether it belonged to that which was drank, or to food and clothing; and with nearly equal claims to propriety, as malt liquors and the produce of fruits other than grapes stand on no higher grounds than the light wines of this and other countries, excluded, in effect, by the law as it now stands. And it would be only another step to regulate real or supposed extravagance in food and clothing."

When the state legislature attempts to reach out and

encroach upon matters *prima facie* within the exclusive sphere and domain of the national government, upon the ground that the health or morals or safety of the community demands prohibitive legislation, it is not only a reasonable but a proper and essential safeguard that the state should be required to establish this public necessity. If presumptions are to be indulged, it must be in favor of free and untrammeled commerce. When a state prohibits all traffic in an article of commerce, and thus clogs commercial intercourse among the states, it *prima facie* encroaches upon the domain of the national government, and should be prepared, in every such case, to establish that the commodity it excludes is not a legitimate article of commerce—not merely according to its local or provincial view or prejudice or interest, but according to national views and national needs. This Court must ever finally adjudicate upon the merits of the question thus raised. It will certainly not say, as the Supreme Court of Pennsylvania has said, that the prohibition of interstate commerce is "a question that has been decided for us" by the legislature.

With respect to matters of purely local concern and internal traffic, the question as to what police regulations are appropriate or necessary is confided, in great measure, to the discretion of the state legislatures. In all such cases a presumption is, therefore, indulged in favor of the validity of the statute, and because thereof this Court has established the rule above mentioned—that unless the statute, in its purpose as evidenced by its necessary effect, clearly and palpably violates some fundamental right, it will be sustained. This was plainly the basis of the decision

in *Powell* v. *Pennsylvania*, 127 U. S., 678, 686, for the Court by Mr. Justice HARLAN in that case said:

"The legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale, or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds other than those produced from unadulterated milk or cream from unadulterated milk, to take the place of butter produced from unadulterated milk or cream from unadulterated milk, will promote the public health, and prevent frauds in the sale of such articles. If all that can be said of this legislation is that it is *unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine, as an article of food*, their appeal must be to the legislature, or to the ballot-box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government."

In that case, no question of interstate commerce was involved. We cannot conceive that such language would ever have been used with relation to a statute unnecessarily oppressive to those engaged in interstate commerce and manufacturing or selling wholesome oleomargarine as an article of food. On the contrary, the Court would say, as enunciated at the last term in *Scott* v. *Donald*, 165 U. S., 58, 91, that no presumption of good faith in the exercise of the state's police power could ever "control the final determination whether the statute, in some of its provisions, is not repugnant to the Constitution of the United States." Conceding that the act is valid as an exercise of the police power in regard to internal affairs, the Court would say, as Mr. Justice Brewer said in *Brennan* v. *Titusville*, 153 U. S., 289, 302:

"We are still confronted with the difficult question as to how far an act held to be a police regulation, but which in fact affects interstate commerce, can be sustained."

The Commonwealth of Pennsylvania wholly failed to introduce any proof tending to establish that oleomargarine was not wholesome, or was so injurious as not properly to belong to commerce or not to constitute a commercial article. If we refer to the records, the fact will be conclusively evinced, that in each of the cases at bar the article for the sale of which, in the original packages of commerce, the plaintiffs in error are prosecuted, is the article of interstate commerce. Moreover, it is a notorious fact within the common knowledge of every one that oleomargarine is a valuable commercial commodity, in use all over the world as an article of food. Certainly, in the absence of proof, no presumption based upon the nature of the article can exist that oleomargarine is injurious in view of the facts above stated under Point II.

If the legislatures of the states could, in the exercise of their police power, finally determine what articles are and what are not lawful subjects of the commerce power, the commerce of the nation would be completely at the mercy of the states.

The language of Grosscup, D. J., in *In re Lebolt*, 77 Fed. Rep. 587, 589, is a very clear discussion of the subject, viz.:

"The constitution of the United States, and the laws of congress in pursuance thereof, and the interpretation of the constitution and laws of congress by the courts of the United States, are the supreme law of the land. The United States, therefore, through its constituted tribunals, is the judge as to whether a given exercise of power upon the part of the state is in reality the exercise of a police power, or is only an attempted restriction or regulation of interstate commerce. It may be one or it may be the other, but the judges of that fact are the authorities of the United States and not the authorities of the state. Therefore, the mere fact that this ordinance, or

any other ordinance or law upon one of these subjects, has been enacted by the authority of the state, is not in itself determinative of its being an exercise of police power. That remains to be determined when the question is raised in a particular case in one of the tribunals of the nation. If that were not the case, the local interests of each State might very seriously affect interstate commerce. A state in which, for instance, the dairy interest predominates, might hold that oleomargarine was unhealthful, and therefore, that its prohibition or its regulation was a matter belonging to the state; whereas, the people of the United States might look upon oleomargarine as a healthful product, and cheaper than the product produced by the dairy interests. On the other hand, in a state where the lard interest predominated, it might look upon the dairy interest as unhealthful to the people. The fact is that there are many doctors now who frighten one every time he eats butter or drinks milk as taking on himself the danger of tuberculosis. So that, if the several regulations were to be left with the local governments, there would be no telling where the power would fall in one case and where it would fall in another. But it is left with the national power in its national tribunals."

IV.

THE PROHIBITION OF THE PENNSYLVANIA STATUTE IS AN UNCONSTITUTIONAL INTERFERENCE WITH INTERSTATE COMMERCE.

The governmental power of the states, called the "police power," which extends to the uncompensated destruction or impairment of property, finds its origin and sole justification in the principle that every person ought to so use his property as not to injure his neighbors, and in the principle correlative to this—that private interests must be made subservient to the general welfare of the community. Otherwise stated, the police power is founded upon and alone justified by public necessity, and has, therefore, been styled "the law of overruling necessity." Public necessity, in the sense of that which sup-

plies the reason of the police power, is exactly coextensive with the protection of the public against the wrongful acts of its individual members. In such cases, the exercise of the power is in immediate connection with the protection of persons and property against injurious acts of other persons, and is essentially self-defensive. The acts of protection are sanctioned and supported by the great principle of securing the public safety.

In the cases at bar, we are not concerned with police laws which, enacted to promote the general peace and order of society, operate equally upon all property and all persons. The inquiry must be directed to ascertaining the necessity which is to support the validity of a special act, an act which singles out for the purpose of destruction a particular class of property or the property of a particular class of persons. "But this must always depend on facts, subject to legal ascertainment, so that the injured may have redress."[1] Such an act is in its nature exceptional, and, if it be not sustained by a necessity reasonably commensurate with evils which the public would otherwise suffer, it is an act without reason—an exercise of power merely and not of right. As was said in the opinion of this Court, by Mr. Justice MILLER, in *Chy Lung* v. *Freeman*, 92 U. S., 275, 280:

"Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity."

And in *Mugler* v. *Kansas*, 123 U. S., 623, 661, Mr. Justice HARLAN used the following language so often quoted:

"If, therefore, a statute purporting to have been enacted to protect

[1] *License Cases*, 5 How., 504, 600.

the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

The statute of Pennsylvania declares that the sale of oleomargarine within its borders shall be a criminal offense. It is not an inspection law. The prohibition of sale or keeping for sale is absolute, and does not depend upon the purity or impurity of the articles. As the court below frankly admitted—"Our statute is directed especially against the sale of oleomargarine as an article of food" (Paul record, No. 88, p. 18). One class of property is thus singled out from other property to be destroyed; and one class of business men is thus singled out from others, to be prosecuted as criminals if they attempt to carry on a legitimate trade in interstate commerce.

The Pennsylvania statute forbids the sale of oleomargarine in any form, even if free from any coloration or ingredient that causes it to look like butter. In each of the cases at bar arising thereunder, the jury by special verdict found that "all the provisions of the act of Congress of August 2, 1886," had been complied with, and that "the fact that the article was oleomargarine and not butter was made known by the defendant to the purchaser, and there was no attempt or purpose on the part of the defendant to sell the article as butter, or any understanding on the part of the purchaser that he was buying anything but oleomargarine."

In *Railroad Co.* v. *Husen* 95 U. S., 465, 472, Mr. Justice STRONG said:

"While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the State; while for the purpose of self-protection it may establish quarantine, and *reasonable* inspection laws, *it may not interfere* with transportation into or through the State, *beyond what is absolutely necessary for its self-protection.* It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or inter-state commerce."

In *Minnesota* v. *Barber*, 136 U. S., 313, 320, Mr. Justice HARLAN said:

"Underlying the entire argument in behalf of the State is the proposition, that it is impossible to tell, by an inspection of fresh beef, veal, mutton, lamb or pork, designed for human food, whether or not it came from animals that were diseased when slaughtered; that inspection on the hoof, within a very short time before animals are slaughtered, is the only mode by which their condition can be ascertained with certainty. * * It may be the opinion of some that the presence of disease in animals, at the time of their being slaughtered, cannot be determined by inspection of the meat taken from them; but we are not aware that such is the view universally, or even generally, entertained. But if, as alleged, the inspection of fresh beef, veal, mutton, lamb or pork will not necessarily show whether the animal from which it was taken was diseased when slaughtered, it would not follow that a statute like the one before us is within the constitutional power of the State to enact. On the contrary, the enactment of a similar statute by each one of the States composing the Union would result in the destruction of commerce among the several States, so far as such commerce is involved in the transportation from one part of the country to another of animal meats designed for human food, and entirely free from disease."

The case of *Powell* v. *Pennsylvania*, 127 U. S., 678, 684, (decided in April, 1888) is distinguished from the cases at bar not only upon the ground that it had relation solely to internal trade and traffic, but also for the reason that the basis of the decision was the assumption of fact "under the

circumstances disclosed in the record" that "most kinds of oleomargarine butter in the market contain ingredients that are or may become injurious to health." There is no proof whatever of this fact in the cases at bar, and the progress in science and manufacture has made it impossible that any such fact should be true at the present time. Moreover, the act of Congress has made it the duty of government officials to prevent deleterious ingredients (c. 840, sec. 14, 24 Stat. 212), and it is proper to assume that the product of manufacturers and dealers licensed by the national government are free from such ingredients.

The necessary and natural operation of the Pennsylvania act is an unreasonable discrimination between two legitimate food products—the exclusion of one (oleomargarine) from the markets of the state, and a consequent destruction or impairment of its value, to the end that the other (butter) may advance in value, by virtue of the monopoly thus granted, far beyond the price which would follow honest competition. Suppose by way of illustration, that a State whose soil was adapted to the growth of wheat but not of corn should, in order to protect its wheat growers, enact that because corn is largely used in the manufacture of bogus and adulterated sugar, the sale of corn as an article of food be prohibited; or that Vermont, in order to protect its maple sugar crop, should prohibit the sale of all sorghum sugar; or that Pennsylvania should prohibit the sale of bran flour because it is used to adulterate mustard; or that West Virginia should prohibit the sale of all anthracite coal "designed to take the place of bituminous coal as an article of fuel"; or that Louisiana should prohibit the use of

beet sugar or glucose or saccharine because these may be used as substitutes for the local product of cane sugar: could it be supposed for a moment that such prohibitions would be upheld in so far as they related to the sale of articles of interstate commerce?

The police power of a state can, of course, be exerted to prevent deception and fraud; but the utmost extent to which deception may reach in some cases can never justify the prohibition of an article not at all deceptive. This act prohibits sales of an article not calculated or intended to deceive, not colored in imitation of butter, manufactured under precautions and methods which now insure its wholesomeness, under the supervision of federal officers whose duty it is to prevent deleterious ingredients, and sold under regulations which absolutely preclude the idea of deception in the sale. If anyone is deceived by oleomargarine in its natural form into eating it for butter, neither the manufacturer nor the dealer, wholesale or retail, is at fault. No fraud has been perpetrated and no injury has been done. The ordinary person will have knowledge, as of notorious facts, that oleomargarine is wholesome and nutritious, and is designed to take the place of butter because in its natural form it is a legitimate and desirable substitute for butter in the opinion of those who cannot afford the more expensive article; that it is used as such all over the world and is an important subject of traffic and interstate and foreign commerce, and that the federal government derives a large annual revenue from the taxation of this article, the regulation of its manufacture and the licensing of those engaged in the business.

If any person having such knowledge—and every person is charged with it—prefers butter to oleomargarine, he should be at liberty to make the choice; and, if he is too poor to buy good butter, he should be at liberty to procure at low prices a wholesome and palatable substitute. Can it, therefore, be said that, in order to protect the dairy interests of a state, the right of preference may be denied to those who prefer oleomargarine or who are too poor to buy butter; that, in order to promote a virtual monopoly in an article of food, the property of those who would encroach upon that monopoly by selling a cheaper substitute may be destroyed; and that, in order to protect the business and products of one state, the business and products of another state may be excluded?

It is submitted that, under the American form of government and constitutional rights of individual liberty, no person can be denied the privilege of manufacturing a legitimate article of trade or food and honestly selling it in another state for what it really is, without fraud or deception.

V.

THE STATUTE OF NEW HAMPSHIRE IS LIKEWISE AN UNCONSTITUTIONAL INTERFERENCE WITH INTERSTATE COMMERCE.

The statute of New Hampshire forbids the sale of oleomargarine within the boundaries of the state "unless it is of a pink color." It cannot be claimed that the purpose of the statute was to protect the health of the public, because sales of the article are freely allowed if it has been colored pink, thus conclusively establishing

that the legislature did not consider or pretend to declare that the article was unwholesome. As the State of New Hampshire has indisputably recognized oleomargarine as an article of consumption and commerce, the question is, therefore: Can a state legislature constitutionally impose upon trade and traffic in an article of interstate commerce any such unreasonable and arbitrary regulation as that it shall be artificially colored pink or blue or green or black or any other unnatural and unpleasant color? The act requires oleomargarine to be pink, not in order to enable purchasers to distinguish it from butter, but in order to make it so unpleasant and unattractive as an article of food as to practically prohibit its sale. To repeat the language of Mr. Justice SHIRAS in *Scott* v. *Donald*, 165 U. S., 58, 91:

"So long, however, as state legislation continues to recognize wines, beer and spirituous liquors [oleomargarine] as articles of lawful consumption and commerce, so long must continue the duty of the Federal courts to afford to such use and commerce the same measure of protection, under the Constitution and laws of the United States, as is given to other articles."

It must be apparent that the natural and necessary purpose and effect of this statute of New Hampshire is the entire prohibition of the sale and use of oleomargarine in its natural form, not colored in imitation of butter or otherwise calculated to injure, deceive or defraud any person. The act is not a quarantine or inspection law. It does not fix a standard of purity or purport to prohibit the use of dangerous or unwholesome food. The deliberate and obvious intention was to render oleomargarine unpleasant and disagreeable.

If such legislation is to be sustained, similar regula-

tions will be aimed at beet sugar, at lard made from cottonseed oil, at oil for salad dressing, at glucose, &c., &c. It must be ridiculously evident that if beet sugar had to be colored pink or green or chocolate or black its market value would be destroyed. So, too, of salad oil, lard, &c.

As has been pointed out in the foregoing argument, the primary inquiry, the decisive fundamental test is whether the commodity is a recognized and legitimate article of commerce. We may repeat that, as the state permits the free sale of oleomargarine if artificially colored, it thereby conclusively recognizes its character as an article of commerce. The Supreme Court of New Hampshire, moreover, has recognized that oleomargarine was a legitimate article of commerce, properly and exclusively within the domain of Congress and of the federal judiciary. The fact was found that "the oleomargarine sold was the oleomargarine of commerce as the same is known and dealt in as an article of food" (p. 7). Even upon the point of *color*, the court below conceded that this was a federal question within "the need of a uniform operation of federal law," and, therefore, entered judgment against Collins in order to "furnish an opportunity to carry the federal question to the only tribunal by which that question can be settled," namely, the question as to the regulation of color. This statement of Doe, C. J., clearly shows that the Supreme Court of New Hampshire interpreted the requirement as to coloring to be a matter not only affecting interstate commerce but constituting a local regulation of what should be national and determined by the national judiciary. If the court had concluded, or could

have concluded, that the inhabitants of New Hampshire were in need of particular protection on this point of color in order to prevent deception and fraud, it would have so held; but it could not sustain the act on any such pretense.

According to the *Plumley* case, oleomargarine does not resemble butter unless artificially colored. In the *Collins* case at bar there was no proof of artificial coloration whatever. There is no evidence in the case that oleomargarine in its natural form resembles butter, and every one knows that it does not. The Court will not presume such a resemblance, particularly in the face of the legislation of most of the states, which proceeds upon the theory, based on fact, that oleomargarine must be artificially colored in order to make it resemble butter. Indeed, the Court may properly take judicial notice of the fact that oleomargarine in its natural condition is white and does not resemble butter unless artificially colored. Nor was there any evidence of an intention to deceive any person, and such an intention could not be presumed. On the contrary, the jury found that all the provisions of the law had been complied with "except the color of its contents was not pink." These provisions were that upon each package should appear in plain Roman letters not less than one-half inch in length, the word "Oleomargarine," and "so placed and made or attached that they can be readily seen and read and cannot be easily defaced;" and "when any such substance or compound is sold in less quantities than the original packages contain, the seller shall deliver to the purchaser with it a label bearing the words indicating its character as

above in like letters." The undisputed compliance with these provisions as well as with the requirements of the act of Congress eliminated any suspicion or pretense of deception and fraud in the sale of oleomargarine, and has, therefore, removed that question from this case.

The distinction between this New Hampshire statute and those which prohibit sales of oleomargarine or other articles colored to represent an article which they are not, is plainly marked. In all those cases it is presumed that such acts of imitation, which it is assumed serve no useful purpose and add nothing to the intrinsic value or merit of the article, are done with intention to deceive and defraud.

Such was the case of *Plumley* v. *Massachusetts*, 155 U. S., 461, 467, 478, where the statute of Massachusetts which prohibited the sale of oleomargarine "artificially colored so as to cause it to look like genuine butter," was upheld as a valid exertion of the police power. Mr. Justice HARLAN there said:

"It appears, in this case, that oleomargarine, in its natural condition, is of 'a light-yellowish color,' and that the article sold by the accused was artificially colored 'in imitation of yellow butter.' Now, the real object of coloring oleomargarine so as to make it look like genuine butter is that it may appear to be what it is not, and thus induce unwary purchasers who do not closely scrutinize the label upon the package in which it is contained, to buy it as and for butter produced from unadulterated milk or cream from such milk. The suggestion that oleomargarine is artificially colored so as to render it more palatable and attractive can only mean that customers are deluded, by such coloration, into believing that they are getting genuine butter. If any one thinks that oleomargarine, not artificially colored so as to cause it to look like butter, is as palatable or as wholesome for purposes of food as pure butter, he is, as already observed, at liberty under the statute of Massachusetts to manufacture it in that State or to sell it there in such manner as to inform

the customer of its real character. He is only forbidden to practise in such matters a fraud upon the general public. The statute seeks to suppress false pretenses and to promote fair dealing in the sale of an article of food. It compels the sale of oleomargarine for what it really is, by preventing its sale for what it is not. * * We are of opinion that it is within the power of a State to exclude from its markets any compound manufactured in another State, which has been artificially colored or adulterated so as to cause it to look like an article of food in general use, and the sale of which may, by reason of such coloration or adulteration, cheat the general public into purchasing that which they may not intend to buy."

No argument is required to show that the New Hampshire statute presents an entirely different question from that involved in the *Plumley* case. It is not a measure compelling "the sale of oleomargarine for what it really is by preventing its sale for what it is not," but a measure to compel the sale of oleomargarine in what is not its natural color. The question here is not whether it is within the power of a state to "exclude from its markets any compound manufactured in another state, which has been artificially colored or adulterated so as to cause it to look like an article of food in general use," but whether this power extends to the exclusion of an article of food in general use unless it be artificially colored so as to render it unpleasant to the sight and to practically destroy its commercial value as an article of food. The legislature might, with equal propriety, have directed the addition of an offensive flavor or odor, or have required that it should be labeled "Poison." Is it, then, to be permitted, in dealing with an article of commerce so universally dealt in as oleomargarine, that one state may forbid its artificial coloration and another compel it; that one state can prevent its coloration and other states require particular colors

according to local prejudice, such as pink, green, purple or black?

The question involved in *Plumley* v. *Massachusetts* arose in *People* v. *Arensberg*, 105 N. Y., 123, 129, where the same principle prevailed and the same conclusion was reached upon the same general ground. The Court of Appeals of New York, by RAPALLO, J., said:

"They may legally be required to sell it for and as what it actually is, and upon its own merits, and are not entitled to the benefit of any additional market value which may be imparted to it by resorting to *artificial* means to make it resemble dairy butter in appearance."

This principle, it will be observed, also controlled the decision in *People* v. *Girard*, 145 N. Y., 105, 109, 110, where the same court upheld a statute prohibiting the manufacture and sale of vinegar containing any preparation injurious to health or any coloring matter, and by FINCH, J., said:

"There is talk here of interference with the vested rights of the individual. Sometimes it is pertinent and weighty, but in this case it is neither. It becomes the assertion of a vested right to color a food product so as to conceal or disguise its true and natural appearance; in plain words, a vested right to deceive the public. * * *The present law does not in the least interfere with the honest manufacture and sale of the distilled vinegar.*"

Undoubtedly, much of the prejudice against oleomargarine in the past may have been due to fraudulent practices and deception. But no necessity for exertion of the police power arising from evils thus occurring can ever justify a destruction of the property of honest manufacturers who may compete with the butter industry by selling oleomargarine for exactly what it is, with no intent to deceive any person and under circumstances

which can in no degree warrant an imputation of an intention to defraud. The plaintiff in error, Collins, is by the record shown to belong to the latter class.

The statute now attacked prohibits all trade in oleomargarine unless artificially colored pink, a restriction which is clearly unreasonable and arbitrary. It would be unreasonable and an abuse of power to prohibit sales of butter unless an unpleasant or loathsome odor or flavor or color be artificially imparted to it. The natural and necessary effect in each of these cases would be the same: a practical prohibition of sales and a consequent destruction of this class of property. What would be said if, in a state where the dairy interests were not dominant, a statute should be passed requiring butter to be artifically colored pink or green or purple upon the pretense that it competed with oleomargarine, a local industry, which the majority of the legislature thought should be encouraged as the poor man's food!

And yet such preposterous legislation would present the identical constitutional question now submitted for adjudication.

This statute which requires oleomargarine to be artificially colored pink is an interference with interstate commerce which should not be tolerated, for the principle could be extended to innumerable commodities. If fraud in the sale of oleomargarine is so extensive as to require any such extreme measure, the regulation should come from Congress and thus be uniform throughout the states. An unconstitutional and dangerous doctrine will secure a footing if this local regulation and restriction of commerce be sanctioned. The only safe rule of conduct must be

that the states cannot interfere in this manner with commercial intercourse and regulate commerce and that Congress alone has the power. As Mr. Justice BREWER said in *Brennan* v. *Titusville*, 153 U. S., 289, 302:

"The silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free."

CONCLUSION.

It is, therefore, submitted that the so-called oleomargarine acts of New Hampshire and Pennsylvania should be declared unconstitutional in so far as they affect interstate commerce, because they conflict with the exclusive power of Congress to regulate commerce among the states, and because they deny that freedom of commercial intercourse which it was the purpose of the framers of the Federal Constitution, above all other considerations, to secure to the people of the United States.

Washington, March 7, 1898.

WILLIAM D. GUTHRIE,
RICHARD C. DALE,
HENRY R. EDMUNDS,
ALBERT H. VEEDER,
Of counsel for plaintiffs in error.

APPENDIX.

STATE STATUTES SHOWING THAT OLEOMARGARINE IS UNIVERSALLY RECOGNIZED AS A LEGITIMATE ARTICLE OF FOOD AND, AS SUCH, A LAWFUL SUBJECT OF INTERSTATE COMMERCE.

Proviso of the Massachusetts statute, which statute was under consideration in the *Plumley* case:

"*Provided*, That nothing in this act shall be construed to prohibit the manufacture or sale of oleomargarine in a separate and distinct form, and in such manner as will advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter." Mass. Stats. 1891, ch. 58, p. 695.

This proviso is retained in the latest act (Stat. 1894, ch. 280, p. 1009).

It has been, in substance, incorporated in the law of seventeen other states:

Alabama, Acts, 1894-5, No. 408, p. 777. *California*, Penal Code, 1897, p. 516. *Colorado*, Laws, 1895, ch. 19, p. 57. *Connecticut*, Pub. Laws, 1893, ch. 114, p. 264. *Delaware*, Laws, 1895, ch. 209, p. 274. *Georgia*, Laws, 1895, pt. 1, tit. 7, p. 67. *Michigan*, Pub. Acts, 1897, Act 76, p. 83. *Missouri*, Laws, 1895, p. 26. *Nebraska*, Comp. Stats., 1895, pp. 1355–1357. *New Hampshire*, Laws, 1895, ch. 115, p. 477. *New Jersey*, Laws, 1895, ch. 332, p. 658. *Ohio*, Rev. Stat., 1897, vol. 2, tit. 5, ch. A, p. 2230. *South Carolina*, Laws, 1896, No. 96, p. 215. *Tennessee*, Anno. Code, 1896, ch. 16, p. 793. *Utah*, Rev. Stat., 1898, tit. 15, p. 242. *Washington*, Anno. Code, 1897, vol. 1, ch. 2, sec. 2846. *Wisconsin*, Laws, 1895, ch. 30, p. 77.

Seventeen other states provide for labeling, forbid arti-

ficial coloring, and the like, and otherwise allow unrestricted manufacture and sale:

Arkansas, Dig. of Stats., 1894, ch. 48, p. 522. *Florida*, Rev. Stat., 1891, ch. 8, p. 831. *Idaho*, Rev. Stat., 1887, tit. 9, sec. 6917, p. 744. *Illinois*, Laws, 1897, p. 151. *Indiana*, Rev. Stat., 1897, sec. 2191, p. 351. *Iowa*, Anno. Code, 1897, secs. 2516-2518, p. 880. *Kentucky*, Laws, 1893, ch. 182, p. 794. *Louisiana*, Rev. Laws, 1897, p. 752. *Mississippi*, Anno. Code, 1892, sec. 1242, p. 365. *Montana*, Stats., 1895, tit. 10, p. 1078. *Nevada*, Gen. Stat., 1885, sec. 4810, p. 1069. *New York*, Rev. Stats., 1896, p. 40. *North Carolina*, Pub. Laws, 1895, ch. 106, p. 105. *North Dakota*, Laws, 1895, ch. 49, p. 61. *Oregon*, Anno. Laws, 1892, ch. 36, p. 1468; Laws, 1893, p. 102. *Rhode Island*, Gen. Laws, 1896, ch. 146, p. 451. *Texas*, Rev. Stat., 1895, Penal Code, tit. 12, ch. 2.

In four states sales are forbidden unless the article has been artifically colored pink:

Minnesota, Gen. Laws, 1891, ch. 11, p. 83. *South Dakota*, Sess. Laws, 1897, ch. 65, p. 183. *Vermont*, Stats., 1894, secs. 4334-4336, Laws, 1890, No. 53, p. 63. *West Virginia*, Code, 1891, p. 1046, Acts, 1891, ch. 8, p. 12.

Nos. 17, 86, 84 & 88.

Reply Brf. of Guthrie, Dale & Veeder for

OLEOMARGARINE CASES.

Supreme Court of the United States.

OCTOBER TERM, 1897.

Filed Mar. 23, 1898.

CLARENCE E. COLLINS, *Plaintiff in error,* *vs.* THE STATE OF NEW HAMPSHIRE. Error to the Supreme Court of the State of New Hampshire.		No. 17.
GEORGE SCHOLLENBERGER, *Plaintiff in error,* *vs.* THE COMMONWEALTH OF PENNSYLVANIA. Error to the Supreme Court of the State of Pennsylvania.		No. 86.
GEORGE E. PAUL, *Plaintiff in error,* *vs.* THE COMMONWEALTH OF PENNSYLVANIA. Error to the Supreme Court of the State of Pennsylvania.		No. 87.
J. OTIS PAUL, *Plaintiff in error,* *vs.* THE COMMONWEALTH OF PENNSYLVANIA. Error to the Supreme Court of the State of Pennsylvania.		No. 88.

REPLY BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

WILLIAM D. GUTHRIE,
RICHARD C. DALE,
HENRY R. EDMUNDS,
ALBERT H. VEEDER,
Of counsel for plaintiffs in error.

Supreme Court of the United States.

OCTOBER TERM, 1897.

Nos. 17, 86, 87, 88.

CLARENCE E. COLLINS, *Plaintiff in error,*
vs.
THE STATE OF NEW HAMPSHIRE.
Error to the Supreme Court of the State of New Hampshire. — No. 17.

GEORGE SCHOLLENBERGER, *Plaintiff in error,*
vs.
THE COMMONWEALTH OF PENNSYLVANIA.
Error to the Supreme Court of the State of Pennsylvania. — No. 86.

GEORGE E. PAUL, *Plaintiff in error,*
vs.
THE COMMONWEALTH OF PENNSYLVANIA.
Error to the Supreme Court of the State of Pennsylvania. — No. 87.

J. OTIS PAUL, *Plaintiff in error,*
vs.
THE COMMONWEALTH OF PENNSYLVANIA.
Error to the Supreme Court of the State of Pennsylvania. — No. 88.

REPLY BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

The brief on behalf of the Commonwealth of Pennsylvania suggests a more critical discussion of two points, viz.:

(I) As to the effect of the special findings of fact by the jury and the decision of the supreme court of Pennsylvania upon the question of the commercial character of oleomargarine.

(II) As to the rule of presumption in regard to any state statute which attempts to regulate or interfere with interstate commerce in an article of recognized commercial character.

It may be proper to mention that the right, privilege and immunity under the Federal Constitution was in each case specially set up and claimed by the plaintiffs in error (record in No. 17, p. 4; in No. 86, p. 12; in No. 87, p. 11, and in No. 88, pp. 12, 17.) Under the practice in Pennsylvania, the proper plea was "not guilty." The jury then found all the facts necessary to bring the case under the commerce clause, and the decision was in favor of the defendant. As the Commonwealth appealed, there was no assignment of errors showing the federal question. It was, however, the only point discussed on the argument, and the only question decided. This fully appears from the opinion of Williams, J., in No. 88 (p. 17.) As such opinion is made a part of the record under the local law (Laws of Pennsylvania 1871, p. 266), it fully complies with the requirement under the practice of this Court and Section 709 of the Revised Statutes of the United States (*Gross* v. *United States Mortgage Company*, 108 U. S., 477, 486; *Adams County* v. *Burlington & Missouri R. R. Co.*, 112 U. S., 123, 129; *Phila. Fire Association* v. *New York*, 119 U. S., 110, 116; *Kreiger* v. *Shelby R. R. Co.*, 125 U. S., 39, 44; *Dale Tile Manufacturing Co.* v. *Hyatt*, 125 U. S., 46, 53; *Walter A. Wood Co.* v. *Skinner*, 139 U. S., 293, 295; *United States* v. *Taylor*, 147 U. S., 695, 700; *Egan* v. *Hart*, 165 U. S., 188, 189; *Thompson* v. *Maxwell Land Grant Co.*, 168 U. S., 451, 456).

I.

As to the effect of the special findings of fact by the jury and the decision of the Supreme Court of Pennsylvania upon the question of the commercial character of oleomargarine.

The rule is well established that the findings of fact by the trial court or jury as well as by the supreme court of the state are absolutely binding upon this Court; and that whatever has been so found or is properly to be implied therefrom must be deemed beyond the power of the Court to re-examine (*Hedrick* v. *Atchison, Topeka etc. Railroad*, 167 U. S., 673, 677; *Dower* v. *Richards*, 151 U. S., 658, 668). This rule is so well established that even if the Court were of opinion, in view of the evidence, that the jury had clearly erred in finding any particular fact, the question would not be examined here (*Chicago, Burlington, &c., R'd* v. *Chicago*, 166 U. S., 226, 246)

The special findings of the jury are substantially the same in all of the cases at bar. For the purposes of the argument we shall take the *J. Otis Paul* case (No. 88), because that is the only case in which any extended discussion by the court below will be found (record, pp. 2–13; 170 Pa. St., 284, 286). The jury found, as stated in the original brief, that Braun & Fitts were engaged in business at Chicago in the manufacture of oleomargarine; that they had been duly licensed under and had complied with all the provisions of the act of Congress; and that they had shipped the package in question from Chicago to their agent, a wholesale dealer in Pennsylvania, which package, unbroken, and with the original

marks, brands and wrappers, was offered for sale. The jury then found, as follows (record, p. 13):

> "On or before the said second day of October, 1893, the said Braun & Fitts shipped to the said defendant, their agent as aforesaid, at their place of business in Philadelphia, a package of oleomargarine separate and apart from all other packages, being a tub thereof containing ten pounds, packed, sealed, marked, stamped, and branded in accordance with the requirements of the said act of Congress of August second, 1886. The said package was an original package as required by said act, and was of such form, size and weight as is used by producers or shippers for the purpose of securing both convenience and handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce, *and the said form, size, and weight were adopted in good faith and not for the purpose of evading the laws of the Commonwealth of Pennsylvania.* * *
>
> "The oleomargarine contained in said tub was manufactured out of an oleaginous substance not produced from unadulterated milk or cream, * * *and the said oleomargarine is recognized by the said act of Congress of August 2nd, 1886, as an article of commerce.*"

The Court must presume that there was evidence to sustain the finding, and that this question, whether the oleomargarine sold was the oleomargarine recognized by Congress, was duly litigated and found in favor of the plaintiffs in error. (*Grand Trunk Railway Co.* v. *Ives*, 144 U. S., 408, 416.)

The supreme court of Pennsylvania did not question the fact that oleomargarine was an article of interstate commerce. On the contrary, the court in its opinion distinctly recognized that it was an article of interstate commerce. Thus Williams, J., said (record, p. 18):

> "Our statute is directed especially against the sale of oleomargarine as an article of food, * * and, *unless*

> *these goods are in such original packages as the laws of the United States must protect*, the sale is clearly punishable under our statute."

This must be taken in connection with the decision of the same court in *Commonwealth* v. *Schollenberger*, 156 Pa. St., 201, 210, where the court conceded that oleomargarine was a legitimate article of interstate commerce, viz.:

> "We do not deny that a nonresident manufacturer may sell his goods and ship them to a buyer in the usual trade packages employed in good faith by manufacturers, without being amenable to the police laws of this state therefor. He may bring them here and hold them in bulk without danger. So much is fairly ruled in *Leisey* v. *Hardin*. He may sell them to the trade or for shipment to the states in the same unbroken trade packages notwithstanding their unlawful character. This clearly results from the rule in *Leisey* v. *Hardin*."

Thereupon, to meet the opinion, the cases at bar were tried, in which it appeared that the plaintiffs in error were trying to sell oleomargarine "in the same unbroken trade packages"—a tub of forty pounds in one case, and tubs of ten pounds each in the other cases. The issue on the original package and the character of the contents was sharply raised; but the court, notwithstanding the finding of the jury, held that the act of 1885 prevented sales within the state even in the original packages of commerce. The following sentence will show the theory and ground of the decision (record, p. 20):

> "But we also said that where the size of the package was adapted for the retail trade, so that 'breaking of bulk' was not necessary to 'reduce the goods into the common mass' and fit them for the retail trade, the traffic so conducted was not interstate, but infra-state, commerce; or, in other words, the common every-day retail traffic of the community in which the store was located."

The whole doctrine of the decision in these Pennsylvania cases is, therefore, that although oleomargarine is a legitimate article of interstate commerce and interstate trade therein cannot be prevented, the state may, nevertheless, prohibit sales within the state. In other words, the ruling was that the protection of the commerce clause depends upon the size of the package and whether or not it is adapted to the retail trade.

It is not at all necessary for the plaintiffs in error to contest the proposition that packages may be so prepared as not to be *bona fide* original packages and so as to constitute a trick or evasion of a local statute. It is very doubtful, however, whether motive can ever enter at all into the consideration of a question as to the exercise of a constitutional right. In the cases at bar, the jury have expressly found, after conflicting evidence upon the point, that "the said form, size and weight were adopted in good faith and not for the purpose of evading the laws of the Commonwealth of Pennsylvania."

II.

AS TO THE RULE OF PRESUMPTION IN REGARD TO ANY STATE STATUTE WHICH INTERFERES WITH INTERSTATE COMMERCE IN AN ARTICLE OF RECOGNIZED COMMERCIAL CHARACTER.

Whenever a state attempts to deny the right of interstate commerce, and the commodity prohibited is, as oleomargarine, a proper and recognized article of commerce, the statute is presumptively void. It is *prima facie* in conflict with the Federal Constitution. It is not correct to say that the state is never called upon to prove facts necessary to sustain any particular exercise of the police

power. On the contrary, it must do so in many cases in order to uphold the exclusion of articles of commerce.

Thus, as the Court will recall, in *Railroad Co.* v. *Husen*, 95 U. S., 465, 470, a law of Missouri was held to be unconstitutional because an unauthorized interference with interstate commerce, and subsequently, in the case of *Kimmish* v. *Ball*, 129 U. S., 217, 221, a statute of Iowa upon the same subject but containing different provisions was sustained as constitutional. In the *Kimmish* case, Mr. Justice FIELD, delivering the unanimous opinion of the Court, discussed the *Husen* case and referred to the fact that the state in the *Husen* case had failed to introduce evidence to support the prohibitive measure. The language of the opinion was as follows:

> "No attempt was made to show that all Texas, Mexican, or Indian cattle coming from the malarial districts during the months mentioned were infected with the disease, or that such cattle were so generally infected that it would have been impossible to separate the healthy from the diseased. HAD SUCH PROOF BEEN GIVEN, A DIFFERENT QUESTION WOULD HAVE BEEN PRESENTED FOR THE CONSIDERATION OF THE COURT."

In the Missouri, Kansas and Texas Railroad case, just decided, Mr. Justice HARLAN emphasized the fact that the Kansas statute did not exclude all cattle. The Pennsylvania statute prohibits dealings in *all* oleomargarine irrespective of purity or impurity.

In the cases at bar, the defendant's brief, notwithstanding the finding of the jury, comments upon the absence of proof as to whether the oleomargarine was wholesome or unwholesome in the following language (p. 13):

> "The prosecuting attorney of the Commonwealth did dispute such character, and relied upon what was conclusive as to the fact; viz., the conclusive determination by the legislature of its unwholesome character."

In *Minnesota* v. *Barber*, 136 U. S., 313, 319, 320, the rule of presumptions was strenuously urged upon the Court, but Mr. Justice HARLAN, delivering the unanimous opinion of the Court, said:

> "The presumption that this statute was enacted, in good faith, for the purpose expressed in the title, namely, to protect the health of the people of Minnesota, cannot control the final determination of the question whether it is not repugnant to the Constitution of the United States. There may be no purpose upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution. In such cases, the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void. This principle of constitutional interpretation has been often announced by this court. * *
>
> Underlying the entire argument in behalf of the State is the proposition, that it is impossible to tell, by an inspection of fresh beef, veal, mutton, lamb or pork, designed for human food, whether or not it came from animals that were diseased when slaughtered; that inspection on the hoof, within a very short time before animals are slaughtered, is the only mode by which their condition can be ascertained with certainty. And it is insisted, with great confidence, that of this fact the court must take judicial notice. If a fact, alleged to exist, and upon which the rights of parties depend, is within common experience and knowledge, it is one of which the courts will take judicial notice. *Brown* v. *Piper*, 91 U. S. 37, 42; *Phillips* v. *Detroit*, 111 U. S. 604, 606. But we cannot assent to the suggestion that the fact alleged in this case to exist is of that class. It may be the opinion of some that the presence of disease

> in animals, at the time of their being slaughtered, cannot be determined by inspection of the meat taken from them; but we are not aware that such is the view universally, or even generally, entertained. But if, as alleged, the inspection of fresh beef, veal, mutton, lamb or pork will not necessarily show whether the animal from which it was taken was diseased when slaughtered, it would not follow that a statute like the one before us is within the constitutional power of the State to enact. On the contrary, the enactment of a similar statute by each one of the States composing the Union would result in the destruction of commerce among the several States, so far as such commerce is involved in the transportation from one part of the country to another of animal meats designed for human food, and entirely free from disease."

To the same effect, on this question of presumption, was *Brimmer* v. *Rebman*, 138 U. S., 78, 83, where Mr. Justice HARLAN, again delivering the unanimous opinion of the Court, said:

> "It is suggested that this statute can be sustained by presuming—as, it is said, we should do when considering the validity of a legislative enactment—that beef, veal or mutton will or may become unwholesome, 'if transported one hundred miles or more from the place at which it was slaughtered,' before being offered for sale. If that presumption could be indulged, consistently with facts of such general notoriety as to be within common knowledge, and of which, therefore, the courts may take judicial notice, it ought not to control this case, because the statute, by reason of the onerous nature of the tax imposed in the name of compensation to the inspector, goes far beyond the purposes of legitimate inspection to determine quality and condition, and, by its necessary operation, obstructs the freedom of commerce among the States."

It was contended in the *Brimmer* case, just as it may be argued here, that the Court should indulge in every

possible presumption, reasonable or unreasonable, supported by or in conflict with notorious facts, in order to sustain the state statute. The Court was asked then, as it may be asked now, to presume that meat might be unhealthy if transported one hundred miles; and many, indeed, so believed at the time the industry of shipping dressed beef was first established. But the Court refused to indulge in any such presumption.

The State of Pennsylvania takes the extreme position that the determination of the legislature is conclusive upon the whole question; namely, "the soundness or unsoundness of the legislative judgment is not supervisable in any court." If that be the law, this Court has been astray on the question for very many years.

It is further urged, on behalf of the State of Pennsylvania, that the state has the right to prevent trade in oleomargarine because oleomargarine may be manufactured with deleterious ingredients which are difficult to discover, and that other states may not take sufficient precautions to insure the manufacture of a wholesome article. The conclusive answer to this suggestion is that Congress has legislated upon this very subject, and has provided under the act of Congress of 1886 a complete system to prevent the use of deleterious ingredients. Even if there were no such federal statute, the answer is to be found in *Barber* v. *Minnesota*, where Mr. Justice HARLAN said (136 U. S., 313, 322):

> "It will not do to say—certainly no judicial tribunal can, with propriety, assume—that the people of Minnesota may not, with due regard to their health, rely upon inspections in other States of animals there slaughtered for purposes of human food. If the object of the statute

> had been to deny altogether to the citizens of other States the privilege of selling, within the limits of Minnesota, for human food, any fresh beef, veal, mutton, lamb or pork, from animals slaughtered outside of that State, and to compel the people of Minnesota, wishing to buy such meats, either to purchase those taken from animals inspected and slaughtered in the State, or to incur the cost of purchasing them, when desired for their own domestic use, at points beyond the State, that object is attained by the act in question. Our duty to maintain the Constitution will not permit us to shut our eyes to these obvious and necessary results of the Minnesota statute. If this legislation does not make such discrimination against the products and business of other States in favor of the products and business of Minnesota as interferes with and burdens commerce among the several States, it would be difficult to enact legislation that would have that result."

So also in *Crutcher* v. *Kentucky*, 141 U. S. 47, 57, Mr. Justice BRADLEY said:

> "Congress would undoubtedly have the right to exact from associations of that kind any guarantees it might deem necessary for the public security, and for the faithful transaction of business; and as it is within the province of Congress, it is to be presumed that Congress has done, or will do, all that is necessary and proper in that regard. Besides, it is not to be presumed that the State of its origin has neglected to require from any such corporation proper guarantees as to capital and other securities necessary for the public safety."

The importance of the language last quoted will be at once seen when we recall that the act of Congress specifically provides for the prevention of deleterious ingredients, and, for all that appears, both in Illinois and Rhode Island the federal and state officials exercise due supervision over the manufacture of oleomargarine. Indeed, in the Report of the Secretary of the Treasury for 1887, p. 377, one of the

government officials reported as follows, in regard to manufacture at Chicago:

> "I find upon careful investigation that the materials used in this district in the manufacture of oleomargarine consist of the very best-selected fats fresh from the slaughtered animal, and, as a rule, not to exceed a day old, and that the methods employed in the manipulation of these fats are cleanly in the highest degree.
>
> "The factories themselves are as clean and sweet as the abundant use of hot and cold water, soap, and scrubbing brushes can possibly keep them.
>
> "I can not ascertain that there is anything used in this district in the manufacture of oleomargarine that can possibly be construed as being deleterious to the public health, either in themselves or in the manipulation; and from the reports of deputies from time to time, I am satisfied that I am correct in saying that there are no articles used in the manufacture of oleomargarine in this district deleterious to the public health."

After setting forth the reports of his subordinates, the Commissioner of Internal Revenue reported to Congress his opinion as follows (p. 378):

> "The foregoing uniformly favorable testimony of sworn United States officers, whose positions guard them from bias towards either the manufacturing interest on the one hand or the dairy interest on the other hand, and the entire absence of complaint under Section 14 of the law, leads this office to conclude that the manufacturers of oleomargarine, upon whose products the internal-revenue stamps and brands appear, are earnestly endeavoring to render their products not deleterious to the public health."

Moreover, even if the Court were of opinion that oleomargarine was unhealthy or indigestible, the rule would not be changed in any degree. Thus, in *Leisy* v. *Hardin*, 135 U. S., 100, 125, Mr. Chief Justice FULLER said:

> "Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by state laws amounting to regulations, while they retain that character; although, at the same time, if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them."

In view of the opinion of the court below, and the extreme ground taken in the defendant's brief as to the alleged conclusive character and binding effect of the declaration of the legislature, the following language of Mr. Justice BROWN in *Lawton* v. *Steele*, 152 U. S. 133, 137, may be instructive, viz.:

> "To justify the State in thus interposing its authority in behalf of the public, *it must appear*, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. *In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.*"

See, also, *Bowman* v. *Chicago, &c., Railway Co.*, 125 U. S., 465, 483.

In *Covington etc. Turnpike Co.* v. *Sandford*, 164 U. S. 578, 595, great stress was laid by the state upon "the established rule forbidding the annulment of a legislative enactment not clearly and palpably unconstitutional;"

but Mr. Justice HARLAN, delivering the unanimous opinion of the Court, said that "it made a *prima facie* case of the invalidity of that statute;" thus showing that a statute may be *prima facie* unconstitutional. In the cases at bar, the plaintiffs in error contend that when a state statute prohibits interstate commerce in an article of recognized commercial character the act is *prima facie* invalid, and that it is for the state to establish that the article is as matter of fact injurious to life or health in order to justify and uphold the exclusion.

And in the Nebraska Maximum Rate cases decided this month (*Smyth* v. *Ames*), Mr. Justice HARLAN, answering the plea that the legislature had plenary power, used language which may well be applied here to the doctrine of the Pennsylvania court that the legislature may declare any article injurious if it sees fit to do so and to many passages in the defendant's brief, viz.:

> "But despite the difficulties that confessedly attend the proper solution of such questions, the court cannot shrink from the duty to determine whether it be true, as alleged, that the Nebraska statute invades or destroys rights secured by the supreme law of the land. No one, we take it, will contend that a State enactment is in harmony with that law simply because the legislature of the State has declared such to be the case; for that would make the State legislature the final judge of the validity of its enactment, although the Constitution of the United States and the laws made in pursuance thereof are the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding. *Art. VI.* The idea that any legislature, State or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institu-

> tions. The duty rests upon all courts, Federal and State, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."

Conclusion.

For these reasons and the argument set forth in the principal brief, the judgments should be reversed and the statutes in question held to be repugnant to the commerce clause of the Constitution of the United States.

Washington, March 22, 1898.

William D. Guthrie,
Richard C. Dale,
Henry R. Edmunds,
Albert H. Veeder,
Of counsel for plaintiffs in error.

Nos. 86, 87 and 88.

Nos. 86, 87, and 88. Of October Term, 1897.

Brf. of Johnson for D. C.

IN THE

Supreme Court of the United States.

Filed March 23, 1898.

OLEOMARGARINE CASES.

George Schollenberger, Plaintiff in Error,
vs.
The Commonwealth of Pennsylvania.
No. 16,101.

George E. Paul, Plaintiff in Error,
vs.
The Commonwealth of Pennsylvania.
No. 16,102.

J. Otis Paul, Plaintiff in Error,
vs.
The Commonwealth of Pennsylvania.
No. 16,103.

IN ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR DEFENDANT IN ERROR.

JOHN G. JOHNSON.

Allen, Lane & Scott, Prs., Phila.

OLEOMARGARINE CASES.

SUPREME COURT OF THE UNITED STATES.

October Term, 1897. Nos. 86, 87, 88.

George Schollenberger, Plaintiff in error, vs. *Commonwealth of Pennsylvania.*	No. 86.
George E. Paul, Plaintiff in error, vs. *Commonwealth of Pennsylvania.*	No. 87.
J. Otis Paul, Plaintiff in error, vs. *Commonwealth of Pennsylvania.*	No. 88.

IN ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF OF DEFENDANT IN ERROR.

One of the States of the Union, the Commonwealth of Pennsylvania, is here, contending for its

right to protect its citizens against what, in good faith, its legislature, with no thought of interfering with commerce, or of discriminating against the citizens or manufactures of any other State, has determined to be unwholesome food and deception. The Act, for whose validity we contend, provides a penalty against the sale by any person, whether resident of Pennsylvania or elsewhere, of the article popularly known as "oleomargarine," whether manufactured within or beyond the State borders, which it declares to be unwholesome and to be incapable of being sold under any precautions which will prevent the ultimate consumer from being deceived as to its real nature as a food product. This Act deals with the article, not in the course of its transportation into, or through, the State of Pennsylvania, but after the termination of the transportation, when it is about to be sold to its citizens.

It is not pretended that this legislation is dishonest, or in excess of the power of the body enacting it. In view of the decision of this court, in Powell *vs.* The Commonwealth, 127 U. S., such contention is impossible. It is claimed, however, that in consequence thereof, persons who might otherwise send oleomargarine into Pennsylvania, will be deterred from so doing, because they will be unable to secure a market therefor.

The Act complained of does not prevent, or interfere with, the transportation. It simply forbids the selling of an article which will deceive the

purchaser as to its nature, and which may be injurious to his health.

The only ground upon which it is assailed in this court is, that it interferes with the power, vested exclusively in Congress, to regulate commerce between States and between a State and a foreign country. It would seem that if it be within the power of a State to protect its citizens against articles deceptive or injurious to health, no Act exercising such power can interfere with the Federal power to regulate commerce, as there can be commerce only in what may be dealt in legally.

If the question in controvery could be determined solely by reading the Constitution of the United States, without reference to precedents, we would urge that the power of a State to protect its citizens against deception and injury cannot conflict with the power in Congress, paramount, of course, if a conflict be possible, to regulate trade and commerce; for if the State, in the legitimate exercise of its power, may condemn the sale of an article within its limits, because of its being unwholesome or deceptive, trade or commerce in such article will fail because of the lack of demand. In the absence of a motive to transport an article, there will be no trade therein to regulate. *Qua* such article, the Federal power will not be destroyed, but will merely be dormant, for lack of material upon which it can be exercised. Excessive taxation by any State may interfere with the power

of its citizens to buy luxuries, or necessaries, manufactured in other States, and, *pro tanto*, with the volume of commerce in such articles. Such taxation, however, although to this extent it might be said to interfere, would not clash with the Congressional power to regulate commerce.

It is the undoubted duty of every State, to open every inch of its territory for the transportation of any article which any person may choose to send into, or through, it, from, or to, any other State or country. It would not seem to be its duty, however, to legislate in such way as to promote a sale of any article forbidden, for sanitary or moral reasons, without regard to the place of its origin, to be sold within its borders. A State would not seem to have abandoned its power to protect its citizens against unwholesome and deceptive articles because it gave to the Congress of the Union, into which it entered, the power to regulate transportation into, and through, it.

Of course, it would be the duty of this court to do what it has ever fearlessly done, viz., to prevent any State, with a real purpose to discriminate against the products and manufactures of another State, from legislating in bad faith. The Federal power would be most delusive and inefficient, if the States of the Union would be permitted to interfere therewith, by legislation enacted with a declared legitimate purpose, if really dictated by another, and a sinister, one.

The decisions of this court show with what vigilant intelligence it has guarded the Union against improperly encroaching legislation. Discrimination against the manufactures or products of another State, however disguised, has never here escaped detection and condemnation.

Viewing the question in controversy by the light of the Constitution, unaffected by precedents, we might argue that the power of the State to protect its citizens in their health, and against deception, is subordinate to nothing. It must be exercised *bona fide;* but, thus exercised, it is a reserved power, unaffected by the grant to Congress of the right to regulate commerce, which is only exercisable upon such trade and commerce as can be conducted between States exercising in good faith their reserved powers.

Of course, however, the present dispute cannot be settled by reading the Constitution of the United States, unaffected by precedents, and it is not intended by the counsel appearing for the Commonwealth of Pennsylvania to rest its case upon any such reading. Counsel must expect that this court will read the Constitution by the light of the context furnished by its past decisions. The court itself, however, will determine to what extent such context will control it. Fortunately, all the crucial points have been discussed by judges, as well those who remain, as those who have gone, with a force of reasoning and with a wealth of learning, that

render it impossible for counsel, even if at liberty so to do, to advance, in the slightest degree, the discussion of points embodied in former decisions.

Where titles and property rights have been acquired upon the faith of past decisions, they should be protected by the doctrine of "*stare decisis;*" but no such doctrine, where great Federal questions are involved, should prevail. If, by any decision in the past, the power of a State has been unduly cramped, "*stare decisis*" is an inadequate excuse for unduly cramping it in the future; and if the Federal power has been unduly restricted, it is not an excuse for continued restriction.

Our adversaries, in their able and very lucid brief, have thought it advantageous to them to make copious citations of phraseology used in the course of the opinions and decisions of this court and of its members. We doubt if such citations always aid in reaching a sound conclusion. It is more helpful to use, as a compass, the underlying principle which determined the result.

This court, in each cycle of its existence, has been compelled to pass upon questions of gigantic national importance. It has not at all times been possible for the strong, the often exceedingly strong, judges who took part in the discussions of the consultation room, altogether to avoid, in the statement of their reasons, advocacy as well as logic. Whilst the decisions have ever been those of the just judge, the opinions, to some extent, at least, have occasionally been argumentative.

In Leisy *vs.* Hardin, 135 U. S., 110, it was held that the article in controversy, ardent spirits, was "subject to exchange, barter and traffic, like any "other commodity, in which a right of traffic ex- "ists, and are so recognized by the usages of the "commercial world, the laws of Congress and the "decisions of courts;" but that "articles in such "a condition as tend to spread disease are not mer- "chantable, are not legitimate subjects of trade and "commerce, and the self-protecting power of each "State, therefore, may be rightfully exerted against "their introduction, and such exercise of power can- "not be considered a regulation of commerce, pro- "hibited by the Constitution."

In that case it was decided that—

> Whenever the law of the State amounts essentially to a regulation of commerce with foreign nations or among the States, as it does when it inhibits directly or indirectly the receipt of an imported commodity, or its disposition before it has ceased to become an article of trade between one State and another, or another country and this, it comes in conflict with a power which, in this particular, has been exclusively vested in the general Government, and is therefore void.

In that case this court did not decide how far the States could go in regulating health and in protecting against imposition and deceit. In Plumley *vs.* Massachusetts, 155 U. S., 461, however, the power of the State to protect its citizens against deception was fully sustained. To this case, in another part of this argument, fuller reference will be made.

The Supreme Court of Pennsylvania did not deem it necessary to put its decision, sustaining the Act of 1885, upon the police power because of its opinion (see Appendix)—

That a manufacturer who puts up his products in packages evidently adapted for and intended to meet the requirements of an unlawful retail trade in another State, and sends them to his own agent in that State for sale to consumers, is not engaged in interstate commerce, but is engaged in an effort to carry on a forbidden business by masquerading in a character to which he has no honest title.

There can be no doubt that the "original package" may be made sufficiently small to enable any forbidden article of meat or drink, in its most minute subdivisions, to be sold to the ultimate consumer. It is not necessary to amplify the thought so well presented by Mr. Justice Williams in the opinion filed on behalf of the Supreme Court of Pennsylvania. It is printed in the Appendix, and counsel for the Commonwealth will be content, without amplification of the argument in that particular, merely to discuss the question to the extent that the police power of the State is involved.

Our adversaries have advanced five propositions upon which they rest their appeal: (1) Oleomargarine is a universally-recognized article of commerce; (2) no State can forbid the sale within its limits of oleomargarine to such extent as the same, remaining in the "original package," was manufactured in another State; (3) all State regulations of the sale of

oleomargarine, to such extent as the same was manufactured in another State, and remains in the "original package," are presumptively illegal, because of their regulating commerce; (4) the Act of Congress of 2d August, 1886, furnishes ample protection to the citizens of the various States against deception in, and injury from, the sale of oleomargarine; and (5) no State can forbid the sale of oleomargarine to such extent as the same was manufactured in another State, even after the "original pack-"age" has been broken.

Under three of these five heads of proposition, we will place some of the statements by which the appellants seek to support them, and will add our comments.

Appellants' Proposition 1.—OLEOMARGARINE IS A UNIVERSALLY-RECOGNIZED ARTICLE OF COMMERCE.

They say (page 15) :—

> The traffic and trade in oleomargarine are clearly such as not only admit of but require one uniform system or plan of regulation, for it is manufactured in only a few of the states, while the demand and market for it exist everywhere. It is indisputably a commercial commodity.

It is difficult to see how, or why, there should be, or can be, but "one uniform system or plan of regu-"lation." There is no reason why oleomargarine should be manufactured in "only a few of the "States." If, however, it can only be thus manufactured, there is no reason why an inspection and

regulation necessary to secure the exclusion of injurious ingredients and to prevent fraud, should be confided to the officials of the States in which the manufacture is conducted, nor even to officials of the United States, who have no duty to perform in the way of conservation of the health of the citizens of the various States. We will deal later, with the assertion about the article being "indisputably a "commercial commodity."

The appellants (page 17) say :—

> In each of the cases at bar, it was established that all the requirements of the act of Congress had been complied with, and this reasonably implies the finding that the oleomargarine did not contain ingredients deleterious to the public health in the absence of all proof to the contrary.

In view of the fact that the Act of Congress does not require that any package must be inspected by an official of the United States, no inference can be drawn from the finding, that the Act of Congress had been complied with, as to the nature of the ingredients. There was no proof that the ingredients of the particular packages sold by the appellants were "deleterious to the public health," because the Legislature of Pennsylvania, acting within what this court has held to be its province, had determined that the article itself was either injurious to the public health, or was calculated to deceive the consumers as to its nature. In the Powell case, this court sustained a refusal to permit the vendors of

oleomargarine to prove, in contradiction of what was declared in the Act of Assembly, that the particular lots sold by them were not unwholesome. After a legislature, in the exercise of its power, in good faith, has determined, that of which its determination is conclusive, that an article is unwholesome, the prosecuting officers of the Commonwealth are not obliged to prove as a fact what cannot be disputed.

The appellants (page 18) say :—

> Oleomargarine has been a constant source of litigation and innumerable cases concerning it have been before the courts; but in no case has it ever been established that as an article of food, if properly manufactured, it was deleterious or injurious to health. The only ground assigned in support of the decisions sustaining the various stringent enactments seeking to fetter the trade has been deception in fraudulently selling oleomargarine for butter, and the only evil complained of or aimed at was successful competition with butter. The fact that oleomargarine as recognized and taxed by the Act of Congress is a legitimate article of food in general use, must be deemed conclusively established; certainly so in the absence of proof to the contrary. And it is not doubted that the court will take judicial notice of the fact as a matter of common and scientific knowledge, that oleomargarine is not injurious to health.

It will be observed that the appellants do not contend that oleomargarine is not "deleterious or "injurious to health;" but merely that "if properly "manufactured" it is not. Not thus contending, they really admit, that oleomargarine is injurious, or healthful, according to the method of its manufacture; and that what they call "the commercial article,"

oleomargarine, in merchantable condition, is not necessarily wholesome. What they contend is only that a merchantable article of oleomargarine, *if properly manufactured*, is wholesome. The great staples of life, corn, wheat, sugar, &c., if in merchantable condition, are wholesome. This so-called "com-"mercial commodity," however, is not. Examination of the product itself will not disclose the fact of its unwholesomeness, even though it exists, inasmuch as it may result from ingredients whose character can only be determined by chemical analysis.

It is conceded that there is a universal fear of "deception in fraudulently selling oleomargarine "for butter." We will endeavor to show, hereafter, that the chance of such deception rests upon the fact that oleomargarine, in the very method and course of its manufacture, is made to imitate butter in appearance, for the purpose of being sold as butter. Whatever be the labels, marks, numbers and envelopes ordered to be put upon oleomargarine, the ultimate consumer takes it from the confectioner in the shape of cakes or candies, from the cook in the shape of soups and sauces, and from the hotel or boarding-house keeper in the shape of a little plat, denuded of coverings, looking, when it has not been converted into something else, like butter.

It is hardly possible for the court to take judicial notice of the fact, "as a matter of common and scien-"tific knowledge, that oleomargarine is not injurious

"to health." The utmost breadth of fact of which it can take notice is, that it may be so made as not to be injurious to health; but that it will be extraordinarily difficult, if not impossible, to insure such making.

The appellants (page 20) say:—

> In the Pennsylvania cases at bar, the State could not and did not dispute the wholesome character of oleomargarine properly manufactured.

The prosecuting attorney of the Commonwealth did dispute such character, and relied upon what was conclusive as to the fact, viz., the determination by the legislature of its unwholesome character.

The appellants (page 21) quote from Tiedeman's Limitations of Police Power to the effect that:—

> Although there has been some attempt made to show that this butter substitute is unwholesome as food, it seems now to be established by the most thorough chemical analyses that there is no unwholesome ingredient in unadulterated oleomargarine.

We may presume that the appellants, in producing, on behalf of oleomargarine, credentials of good character, have supplied the best within their power. Do they go very far in that direction when they quote Tiedeman, to the effect that oleomargarine, manufactured in the best possible, and perhaps practically impossible, way, has been shown by chemical analysis to contain no unwholesome ingredient? Unfortunately, the consumer, when the article is presented

to him, is unable to make the necessary "chemical "analysis." If what is furnished to him be the "un- "adulterated oleomargarine" of the imagination, he may not be injured. How is he to be assured that this is the nature of what is supplied to him? By way of further credential, (page 21), the appellants quote from the report of the Commissioner of Internal Revenue to the effect that—

> Oleomargarine, carefully and properly prepared, is a healthful article of diet, and a wholesome substitute for butter.

Again we call attention to the fact thus made to appear, not that the article itself is necessarily wholesome, but that if the best possible method of preparation be pursued it can be so made.

The quotation by appellants (page 21), from Professor Caldwell, to the effect that "under such restric- "tions it seems to me that the trade in this article "might safely be left to itself," affords but little assistance, in the absence of any disclosure of what that gentleman regards as necessary restrictions.

The appellants (page 22) say :—

> It would be an extraordinary contention that oleomargarine is not, at the present time, a legitimate and recognized article of commerce, when nearly every State of the Union now regulates and permits its sale. The regulations in many instances are unreasonable and needlessly severe; yet the fundamental fact remains that almost every State recognizes oleomargarine as a commercial and wholesome commodity and expressly permits its sale as such.

"Regulations, in many instances unreasonable "and needlessly severe," establish the fact that oleo-

margarine, as such, is neither wholesome, nor non-deceptive, nor recognized as an article of commerce; but that, under regulations which may or may not be effective in producing desired results, it is permitted by most of the States to be sold.

The dividing line of legality, drawn by the appellants, is between legislation which prescribes "unreasonable and needlessly severe" regulations, and legislation which, because of the impossibility, under any regulations, to insure the necessary result of safety, forbids the sale of what, unless successfully regulated, is practically conceded to be unwholesome and deceptive. The Massachusetts Act, which the appellants admit to be legal and almost praiseworthy, does not prohibit the sale of oleomargarine "in a "separate and distinct form and in such manner as will "advise the consumer of its real character, free from "coloration or ingredient that causes it to look "like butter." We will endeavor to show, hereafter, that the oleomargarine of so-called "commerce," never advises "the consumer" of its real character, and is never "free from coloration or ingredient "which causes it to look like butter."

The appellants (page 22) say:—

> When it is found that this proviso (in the Massachusetts Act) appears almost word for word in the legislation of seventeen other States, and that in the legislation of twenty-one States, where this provision is not found, sales are permitted under regulations against deception, the conclusion would seem to follow, as of course, that the article has a legitimate

commercial character and that a State can not, by the mere declaration of its will, take away that character and ordain that it shall no longer be an article of commerce.

The certificate of character, not ruthlessly to be "taken away," given by the legislation referred to, is to the effect that oleomargarine, manufactured and sold in such way as advises the consumer of its real character, free from anything that causes it to look like butter, is permitted to be sold by seventeen States; but that it is not, under the legislation of twenty-one other States, permitted to be sold, because of its liability to deceive as to its character, saving under "more or less stringent regulations," the nature and extent of which the appellants are perhaps wise in not stating. Can it be that an article is a "commer-"cial commodity," whose character is so bad that thirty-eight States feel compelled to guard against its unwholesomeness and likelihood to deceive? How many States have felt compelled, because of the inadequacy of any regulations, to prohibit *in toto* its sale?

The appellants (page 34) say :—

Moreover, it is a notorious fact, within the common knowledge of every one, that oleomargarine is a valuable commercial commodity, in use all over the world as an article of food.

In view of what is said elsewhere by the appellants, we may take it that the oleomargarine which is "a valuable commercial commodity" is an ideal oleomargarine, prepared by honest persons, in the

best possible way, under the closest possible supervision of manufacture.

The appellants (page 38) say:—

> The case of Powell *vs.* Pennsylvania (decided in April, 1888) is distinguished from the cases at bar * * * for the reason that the basis of the decision was the assumption of fact "under the circumstances disclosed in the record" that "most kinds of oleomargarine butter in the market con-"tain ingredients that are, or may become, injurious to health." There is no proof whatever of this fact in the cases at bar, and the progress in science and manufacture has made it impossible that any such fact should be true at the present time.

We concede it may be difficult, perhaps impossible, to prove, concerning all the oleomargarine forced upon the citizens of the United States, that it contains ingredients which are, or may become, injurious to health. The only method of proof, as we have heretofore contended, would be a practically impossible chemical analysis. Because of the difficulty, and almost impossibility, of proof, of a fact which must always be apprehended, each State has the right, according to the judgment of its legislature, to protect its citizens by regulations, or, if it deems this insufficient, by prohibition. The argument is not a strong one which seeks to undermine a basis of fact, heretofore acted upon by this court, by the suggestion that "there is no proof whatever "of any such fact (injuriousness to health) in the "cases at bar." This court having decided that proof of the condition of the particular article sold by the indicted vendor is inadmissible, the fact of

lack of any proof, "in the cases at bar," is not difficult to understand.

The question of whether or not the public health can be conserved sufficiently by regulations "unreasonably and needlessly severe," or whether it can only be conserved by prohibition, is necessarily a legislative one. The necessity of regulation being conceded, if such regulation be not sufficiently conservative of health, must not the legislatures of the various States be allowed to determine the proper remedy for the evil?

Appellants' Proposition 3.—ALL STATE REGULATIONS OF THE SALE OF OLEOMARGARINE, TO SUCH EXTENT AS THE SAME WAS MANUFACTURED IN ANOTHER STATE, AND REMAINS IN THE ORIGINAL PACKAGE, ARE PRESUMPTIVELY ILLEGAL BECAUSE OF THEIR REGULATING COMMERCE.

Under this head the appellants (page 30) say:—

When a State legislature acts within its sphere of local concerns every reasonable presumption is indulged by this court in favor of the validity of the enactment; and it is now the settled rule of constitutional exposition that if a State, in enacting any law, may or may not be, according to circumstances, within the limits of legislative authority, the existence of the circumstances necessary to support the law is presumed. But no such presumption can be indulged when State legislation, *prima facie*, affects and encroaches upon commerce among the States. Then it must appear clearly and affirmatively that the local regulation is grounded in some fair necessity for the exercise of the police power, and is a necessary provision for

the protection of the community. It must be conclusively established, if an article be excluded, that it "no longer belongs "to commerce, or, in other words, that it is not a commercial "article." The protection or guaranty of the Federal Constitution is *general*, affecting the people of all the States; the police power of the State is *special*, affecting only the people of one State; and consequently, whenever it appears, *prima facie*, that the special power encroaches upon the general power, the presumption must be in favor of the latter. Were it otherwise, the result would minimize the value of the Federal pledge of freedom of commerce and vastly extend the power of the States.

There is a concession by the appellants that there may be "local regulation," in the case of oleomargarine, if it "is grounded in some fair ne- "cessity for the exercise of the police power and is "a necessary provision for the protection of the "community." Without local regulation, no legislature permits its sale. Even under the contention of the appellants, oleomargarine is, or is not, a commercial article, according to the manner of its manufacture. Does it not follow, as an inevitable sequence, that if any legislature finds, or thinks it finds, regulation insufficient for the necessary purpose of protection, it can prohibit?

We repudiate the idea that any legislation by the States, in legitimate exercise of a conceded police power, is presumptively illegal and is subject to the condition of proof of the absolute necessity of the regulation or prohibition. The remedy for the evil is within the judgment of the legislature, which judgment, if not fraudulently but hon-

estly exercised, is not only presumptively, but conclusively, valid.

We fail to find any citation by the appellants, of any decision of this court, holding legislation, honestly enacted within the limit of the legislative power, to be subject to any disfavoring presumption. The burden is upon those who set up legislation, to show it to be within the power of the tribunal enacting it; but after showing this, in the absence of fraud or necessary inference of dishonesty, it must be held to be valid.

Under the appellants' theory in this respect, it will be difficult to sustain any State inspection or regulation laws, so far as they affect imported articles. In the Plumley case, this court, under this view, should have held, in the absence of evidence that the Massachusetts Legislature was not maliciously instigated, that the regulation it sustained was bad.

The appellants (page 31) say :—

> When the State legislature attempts to reach out and encroach upon matters *prima facie* within the exclusive sphere and domain of the National Government, upon the ground that the health or morals or safety of the community demands prohibitive legislation, it is not only a reasonable but a proper and essential safeguard that the State should be required to establish this public necessity. If presumptions are to be indulged, it must be in favor of free and untrammeled commerce. When a State prohibits all traffic in an article of commerce, and thus clogs commercial intercourse among the States, it *prima facie* encroaches upon the domain of the National Government, and should be prepared, in every such case, to establish that the commodity it excludes is not a legitimate article of commerce—

not merely according to its local or provincial view or prejudice or interest, but according to national views and national needs. This court must ever finally adjudicate upon the merits of the question thus raised.

The State Legislature, in the present case, has not attempted "to reach out and encroach upon matters "*prima facie* within the exclusive sphere and domain "of the National Government." It has not discriminated against the manufactures or products, of any other State. It has provided for the health of its own citizens, within the limits of what has been conceded by this court to be its power. It has not sought to interfere with commerce. There can be no pretext that the legislation, to which exception is taken, was enacted with any intent to interfere with commerce, or with any other intent than to protect the citizens of Pennsylvania against an unwholesome article and deception. The title of the statute is: "An Act for the protection of the public "health and to prevent adulteration of dairy prod-"ucts and fraud in the sale thereof." There is no physical reason why oleomargarine cannot be manufactured in Pennsylvania. It has been expressly held by this court that the State is under no obligation "to establish the necessity" of its legislation. There is no foundation, in decisions, for the assertion of the appellants, that the necessity of protecting the public in its health and against deception does not exist, in the case of a particular product, equally, whether manufactured in the State in which it is

found, or in another. The Act of 1885 is not an Act levelled against "traffic in articles of commerce" between the States. It is one local in its character, enacted by a legislature to which was intrusted the duty of conservation of the health of all the citizens of the locality. Its "necessity" exists irrespective of the place of origin of the prohibited article. The citizens of Pennsylvania may refuse to buy oleomargarine, and though producers in other States will still have the untrammeled right to send the same into Pennsylvania none will be likely to be sent, and commerce in such article will be diminished. In like manner, the Legislature of Pennsylvania, having a right to condemn the sale of an unwholesome or of a deceptive article within its limits, it will not, by so condemning, illegally interfere with commerce, though a condition of affairs may result which will lead to the loss of any market for the article.

The appellants (page 34) say :—

> If the legislatures of the States could, in the exercise of their police power, finally determine what articles are, and what are not, lawful subjects of the commerce power, the commerce of the nation would be completely at the mercy of the States.

We concede that if the legislatures of the States are permitted, under pretext of exercising their police power, to discriminate against imported articles, whether coming from other States or from foreign countries, there will be disunion instead of union. We contend, however, that where, in their

judgment, an article—certainly such an article as oleomargarine—is deemed unwholesome or deceptive, there is need to exercise their police power; that the exercise of this power will not regulate commerce; and that the soundness, or unsoundness, of the legislative judgment is not supervisable in any court.

It can hardly be presumed that a State "is med-"dling with a matter confided to the National Gov-"ernment," where, treating all persons alike, it condemns as unwholesome and deceptive, an article such as oleomargarine, requiring, of necessity, regulation of its manufacture and sale. There is a vast difference between a determination of "what articles are, "and what are not, lawful subjects of the commerce "power," and the determination, by each State, of what is necessary for the protection of its citizens from imposition and injury to health.

The appellants (page 40) say :—

> The police power of a State can, of course, be exerted to prevent deception and fraud; but the utmost extent to which deception may reach in some cases can never justify the prohibition of an article not at all deceptive. This Act prohibits sales of an article not calculated or intended to deceive, not colored in imitation of butter, manufactured under precautions and methods which now insure its wholesomeness, under the supervision of Federal officers, whose duty it is to prevent deleterious ingredients, and sold under regulations which absolutely preclude the idea of deception in the sale. If any one is deceived by oleomargarine in its natural form into eating it for butter, neither the manufacturer nor the dealer, wholesale or retail, is at fault. * * * It is submitted that,

under the American form of government and Constitutional rights of individual liberty, no person can be denied the privilege of manufacturing a legitimate article of trade or food and honestly selling it in another State for what it really is, without fraud or deception.

The appellants rely upon the labels and envelopes of their ten-pound packages, as "absolutely precluding the idea of deception in the sale." The confectioner, purchasing this article with knowledge of its character, in selling it again in a converted shape to his customers, absolutely ignorant thereof, concerns himself but little about labels and coverings which, long before his customers swallow it, disappear. The people innumerable, who live in boarding houses and in hotels, are furnished with oleomargarine, clear of all explanatory labels and coverings. A very large percentage of this article consumed, must be consumed by those to whom no warning is given by the labels, &c., affixed under the Act of Congress.

No United States officials are stationed at the various manufactories of this article. There is, and there can be, no practical supervision of the ingredients used, nor of the methods of manufacture. At best, all that can be done by the United States officials will be, occasionally, to make a chemical analysis of a particular lot. Infinitely the larger percentage of what is sold, will reach the ultimate consumers without any other protection than that accorded by the honesty and unselfishness (?) of the manufacturer.

We will endeavor to show, hereafter, that oleomargarine is so manufactured that it resembles butter, in order that the ultimate consumer, who sees no labels or tags, may be deceived.

Appellants' Proposition 5.—NO STATE CAN FORBID THE SALE OF OLEOMARGARINE TO SUCH EXTENT AS THE SAME WAS MANUFACTURED IN ANOTHER STATE, EVEN AFTER THE "ORIGINAL PACKAGE" HAS BEEN BROKEN.

The appellants (pages 25–6–7) say:—

> But it was not held, and this court has never held, that the breaking of bulk deprives the articles of the protection and benefit of the commerce clause. It has never been decided that the commerce clause protects only the dealer at wholesale and that States are at liberty to prohibit the sale at retail of recognized and legitimate articles of commerce, imported from other States or other countries, so soon as the bulk of the original package is broken. * * * This misconception is that the commerce clause protects only so long as the article remains unbroken in the original package of interstate commerce, and ceases to protect the contents when the package is broken. * * * The question as to whether or not an article is a subject of lawful commerce, and the converse question as to whether or not an article is a subject of a lawful exercise of the police power, cannot depend upon its form or casual quantity. An article, commercial in its nature, as determined by reference to commercial usage, does not lose this natural character at any time.

The idea underlying these assertions is, that an article which, at one time, was transported from one State into another, may be sold in the latter State, in contravention of the police regulations thereof, not only by the original importer, but by all subse-

quent grantees, not only in its "original package," but in any subdivisions thereof which may become necessary in the course of retail trading.

We do not deny that the proposition, as the appellants put the same, is logically consistent with the position they assert, and which it is necessary for them to maintain. Of course there is no decision which sustains it. On the contrary, the decisions are fatally adverse. We are very sure, however, that the appellants appreciate the necessity, by way of protection to their business, of recognition of their advanced proposition.

Health laws deal with things. The appellants refuse, however, to recognize that what is unwholesome, if it has its origin in the State in which it is finally found, will be not less unwholesome, though it once had a *habitat* in another State.

It is not difficult to see why they make their almost startling suggestion as to sales in broken, or new, packages. Under the United States statute, the retailer is obliged to sell from the original package; but, in the ordinary course of trade, he must break the same and must sell to his retail customer, the smaller parcels contained therein. It is this retail trading they desire this court to protect. They therefore claim that State legislation is violative of the commerce clause of the Constitution if it provides against selling oleomargarine by retailers, in smaller parcels, taken from the original package. Their theory is, that imported goods do not really

form part of the mass of property in the State in which they are found until after they are consumed.

If it be the duty of the States, not only to permit articles to be brought into them, but to promote their sale by treating as void all health legislation, then the appellants may be right in their contention that in the most minute subsequent divisions of the original package, the smallest retailer is clear of all sanitary provisions. If this very advanced argument prevails, a certain class will hereafter regard the commerce clause of the Constitution with the favor once accorded to an "*alibi.*" The criminal laws of the several States must fall as illegal, if foreign poisons and foreign cartridges be used.

In view of the citations by the appellants themselves, of decisions of this court, holding that the commerce clause does not protect an import after the breaking of the original package, we will not waste time in endeavoring to meet their proposition.

Having considered the main positions maintained by the appellants, and having made our comments thereon, we will now state those upon which the Commonwealth of Pennsylvania relies, in addition to the one dealt with by the learned Justice of its Supreme Court:—

I. The wholesomeness of oleomargarine is dependent upon the method of its manufacture. It cannot be ascertained by any superficial examination thereof.

II. Any certainly effective supervision of the method of its manufacture is impossible.

III. Olemargarine is manufactured to imitate, in its appearance, butter, with a view to deceiving the ultimate consumer as to its character.

IV. Deception of the ultimate consumer as to its true nature cannot be avoided by coverings, labels or marks.

V. Owing to its deceptive appearance and to its unwholesomeness, unless manufactured in a way which cannot be assured, the Legislature of Pennsylvania was justified in protecting its citizens against oleomargarine by prohibiting its sale.

VI. Oleomargarine is a newly-discovered article which is only permitted by the United States and (with a very few exceptions) by the States of the Union, to be dealt in under the most severe regulations.

VII. In the State of Pennsylvania, for the last twelve years, after a brief period of effort to guard against fraud and unwholesomeness in the manufacture and sale of oleomargarine by regulation, it has been deemed necessary, because of the impossibility otherwise to protect the citizens thereof, absolutely to prohibit any dealing therein.

VIII. Each State has a right, in the case of a newly-invented food product, to determine for its citizens the question of whether it is wholesome and non-deceptive. Neither the Congress of the United States nor the legislatures of other States can deprive it of this right.

IX. Oleomargarine does not belong to the class of universally-recognized articles of commerce. Not being within this class, the legislation of Pennsylvania does not affect commerce.

X. Non-discriminative legislation, enacted in good faith for the protection of health, and the prevention of deception, not hampering the actual transportation of merchandise, is not presumptively void but is conclusively valid.

I. The wholesomeness of oleomargarine is dependent upon the method of its manufacture. It cannot be ascertained by a superficial examination thereof.

The first part of this proposition is established by the fact, admitted by the appellants, that practically all the States, except those (number not stated by them) which have altogether forbidden the use, have been compelled to protect their citizens by "regula-"tions in many instances unreasonable and need-"lessly severe."

In vol. IV. of the Encyclopædia Brittanica it is said :—

> Pure oleomargarine butter is said to contain every element that enters into cream butter and to keep pure much longer; but there is the defect of not knowing when it is pure or what injurious ingredients, or objectionable processes, may be used in its manufacture by irresponsible parties.

The article concludes thus :—

> We append a comparative analysis of natural and artificial butter, which shows, that when properly made, the latter is a wholesome and satisfactory substitute for the former.

In Powell *vs.* Pennsylvania this court stated a fact which has probably never been denied antecedently to the filing of the appellants' brief in this case, viz., that "most kinds of oleomargarine butter in the mar- " ket contain ingredients which are, or may become, " injurious to health."

The second part of this proposition is self-evident. A defect in the process of manufacture is not disclosed by the appearance of the manufactured article.

II. Any certainly effective supervision of the method of manufacture of oleomargarine is impossible.

This proposition is one nearly self-evident. It will be impossible for the officials of any State into which oleomargarine is likely to be sent, to devise, for the protection of its citizens, an inspection at the place of manufacture, of the methods of manufacture of the article which is so to be sent. Within the boundaries of the State, where the manufacturing is to be done, it will be impossible to detail a corps of officials, sufficiently large, sufficiently honest, and sufficiently intelligent, satisfactorily to supervise the methods of preparation.

An article which is wholesome or unwholesome, according to the method of its manufacture, is so dangerous that prohibition, rather than precaution is the only real safeguard.

III. Oleomargarine is manufactured to imitate, in its appearance, butter, with a view to deceiving the ultimate consumer as to its character.

In vol. IV. of the "Encyclopædia Britannica," in the article upon "Oleomargarine," after describing the method of obtaining the butter oil, it is said :—

Much of the oil is exported to Europe in this way, there to be churned with milk into artificial butter. If properly sealed up, it will keep an indefinite period. It is of a light-yellow color and an agreeable taste, melting in the mouth like butter. When churned, it is mixed in the proportion of four hundred and forty-two parts oleomargarine, one hundred and twenty parts milk, thirty-seven and one-half of butter and one and three-quarters ounces bicarbonate of soda. This is churned from five to ten minutes, some coloring matter added, and then churned from thirty to forty minutes longer. The substance produced resembles butter in taste and appearance, though it has a tendency to crystallize and become lumpy.

The article further states :—

In view of the extensive and growing sale of this substance in the United States as cream butter, restrictive laws have been passed by several of the States, and the better to prevent fraudulent sales, Congress has recently passed a stringent law taxing the manufacture and sale. * * * Sold for what it is, oleomargarine is not likely to interfere greatly with the dairy business of this country, as it will be used mainly for cooking purposes.

In vol. XVII. of the "Encyclopædia Britannica," is to be found an extract from a report by Mr. Drummond, secretary of the British Embassy to Washington in 1880, in which the method of obtaining the oil is described. The writer adds :—

This oil, which on cooling freezes into a semi-solid fat, constitutes oleomargarine, and is recommended as an excellent

substitute for melted butter. Of the oil, considerable quantities are worked up into imitation butter. For this purpose it is violently churned up with milk for about twenty minutes, a little annotto being added to produce a yellow color. The emulsion is run direct on a mass of pounded ice to cause it to solidify without crystallization. After having been again churned up with fresh milk, it is kneaded to remove the excess of water, salted (in short, manipulated as genuine churned butter is), and sent out into the market.

In vol. II. of the "Encyclopædia Britannica," concerning annotto, it is said .—

Amongst civilized communities its principal use is for coloring butter, cheese and varnishes.

In the "Century Dictionary," the method of obtaining the oil is given. It is then said :—

This substance has been largely used as an adulterant of butter. When oleomargarine is churned in a liquid state with a certain proportion of fresh milk, a butter is produced which mixes with it, while the buttermilk imparts a flavor of fresh butter to the mass, making it so perfect an imitation that it can scarcely be distinguished by taste from fresh butter.

In the Act of 2d August, 1886, there is the following definition of oleomargarine :—

All substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, &c.; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef fat, suet, lard, lard oil, vegetable oil, annotto and other coloring matter, intestinal fat and offal fat made in imitation or semblance of butter, or when so made, calculated or intended to be sold as butter, or for butter.

In People *vs.* Arensberg, 105 N. Y., 131, Judge Rapallo refers to the testimony of two chemists to the effect that :—

> It was a golden yellow color, which was the color of natural butter, and that the natural color of oleomargarine fat was pure white. Another witness for the prosecution, a chemist, who stated that he was familiar with butter and with oleomargarine, testified that the natural color of oleomargarine was a pearly white, a creamy white, and that without any artificial coloring it did not resemble butter.

The slightest familiarity with this article discloses the fact that its color, by some artificial means, is made to resemble that of butter. In its natural color it never appears in the hands of a dealer. The whole object of the churning, of the admixture of color and of the flavoring, is to destroy its own appearance and to give to it that of butter. Those who manufacture it, know that its sale would be most seriously interfered with, if presented to the consumer in its own, uninviting, shape.

The appellants (page 39) put this illustration :—

> Suppose, by way of illustration, that a State whose soil was adapted to the growth of wheat, but not of corn, should, in order to protect its wheat growers, enact that, because corn is largely used in the manufacture of bogus and adulterated sugar, the sale of corn as an article of food be prohibited ; or that Vermont, in order to protect its maple sugar crop, should prohibit the sale of all sorghum sugar ; or that Pennsylvania should prohibit the sale of bran flour because it is used to adulterate mustard.

The soil of Pennsylvania is quite as well adapted to the manufacture of oleomargarine as is that of

any other State. Schollenberger, one of the appellants, is the agent of a manufacturer of Providence, R. I., the soil of which is certainly no better adapted than is that of Pennsylvania to the manufacturing of this compound. Though corn may be "largely used in the manufacture of bogus sugar," it is also a perfectly wholesome article of commerce, which is mainly used for legitimate purposes. A parallel with the case of oleomargarine would be, not that put by the appellants in illustration, but that of a product so manufactured in imitation of the appearance of corn as, inevitably, to deceive purchasers.

In the second annual report of the Dairy and Food Commissioner of Pennsylvania, there is a paper by the Chemist of the Department, who quotes, in connection with a statement of the analysis of articles sold as oleomargarine:—

The following formulæ, taken from a recent issue of the *Druggists' Circular*, gives a good idea of the nature of these preparations:—

	Parts.
Annatto seed, bruised	10
Turmeric	3
Ammonium carbonate	1
Cottonseed oil	75
Lard	10

Extract of annatto	10	ounces
Turmeric	5	ounces
Logwood chips	2½	ounces
Cottonseed oil	1	gallon

The manufacturers of oleomargarine are now, however, employing coal-tar colors, and among these "methyl orange" seems to be most frequently used. The detection of special coal-tar colors when mixed with other materials is rather difficult, not only because the high coloring power of these bodies enables a very small quantity to be used, but also because it is sometimes difficult to separate them from the substance with which they are mixed.

IV. Deception of the ultimate consumer of oleomargarine, as to its true nature, cannot be avoided by coverings, labels or marks.

This court, and other courts, have found the necessity of protecting trade marks, not in the fact that wholesale, or even retail, dealers are deceived as to the origin of the imitating goods, but because these dealers are often not unwilling to buy a cheap article with knowledge, and to sell it to those ignorant of its real character. The injury to the owners of such trade marks has been found to result from the deception practiced upon the ultimate consumer.

Though the guards surrounding wholesale and retail dealing be sufficiently great, which we doubt, to prevent selling otherwise than in marked packages, there can be no protection to those who consume the article, converted into cakes, confectionery or cooked food, or as it is found upon the table. The ultimate consumption is by parties who never see the coverings, labels or marks. The persons who will be injured, because of their being the consumers of the unwholesome, or deceptive, article, are afforded no protection.

V. Owing to its deceptive appearance, and to its unwholesomeness, unless manufactured in a way which cannot be assured, the Legislature of Pennsylvania was justified in protecting its citizens against oleomargarine, by prohibiting its sale.

This court, in Plumley *vs.* Massachusetts, 155 U. S., 462, has asserted, in the most unequivocal language, the right of a State to protect its citizens, by prohibiting the sale of an article deceptive in its appearance.

It is true that the Massachusetts statute did provide against a prohibition of the manufacture or sale of oleomargarine "in a separate or distinct form, "and in such manner as will advise the consumer "of its real character, freed from coloration or in- "gredients that cause it to look like butter."

If the methods of manufacture of oleomargarine are correctly described in the standard authorities, no oleomargarine can be sold in Massachusetts, because none is "free from coloration or ingredients "that cause it to look like butter."

We do not think it will be denied that annotto, or some similar drug, is used to change the pallor of the intestinal fat, to the attractive yellow of dairy butter.

It is averred, in the title of the Pennsylvania statute, that it is enacted for the purpose of protecting from deception. The legislature was convinced that, owing to the artificial appearance given to all

known forms of oleomargarine, the article itself was necessarily deceptive.

In the Plumley case it was said (page 466) :—

Nor was the Act of Congress relating to oleomargarine intended as a regulation of commerce among the States. Its provisions do not have special application to the transfer of oleomargarine from one State of the Union to another. They relieve the manufacturer or seller, if he conforms to the regulations prescribed by Congress or by the Commissioner of Internal Revenue under the authority conferred upon him in that regard, from penalty or punishment so far as the general Government is concerned, but they do not interfere with the exercise by the States of any authority they possess of preventing deception or fraud in the sales of property within their respective limits. * * * Now the real object of coloring oleomargarine so as to make it look like genuine butter is that it may appear to be what it is not, and thus induce unwary purchasers, who do not closely scrutinize the label upon the package in which it is contained, to buy it as and for butter produced from unadulterated milk or cream from such milk. The suggestion that oleomargarine is artificially colored so as to render it more palatable and attractive can only mean that customers are deluded, by such coloration, into believing that they are getting genuine butter. If any one thinks that oleomargarine, not artificially colored so as to cause it to look like butter, is as palatable or as wholesome for purposes of food as pure butter, he is, as already observed, at liberty under the statute of Massachusetts to manufacture it in that State or to sell it there in such manner as to inform the customer of its real character. He is only forbidden to practice, in such matters, a fraud upon the general public. The statute seeks to suppress false pretenses and to promote fair dealing in the sale of an article of food. It compels the sale of oleomargarine for what it really is, by preventing its sale for what it is not. Can it be that the Constitution of the United States secures to any one the privilege of manufacturing and selling an article of food in such manner as to induce

the mass of people to believe that they are buying something which, in fact, is wholly different from that which is offered for sale? Does the freedom of commerce among the States demand a recognition of the right to practice a deception upon the public in the sale of any articles, even those which may have become the subject of trade in different parts of the country?

This court took occasion to say, with emphasis, that it had never inquired whether a State, in the exercise of its police powers, might not protect the public against deception. Deception must necessarily result from the sale, within the limits of the State, as food, of a compound so prepared as to be made to appear to be what it is not.

In the Plumley case it was said (page 472):—

If there be any subject over which it would seem the States ought to have plenary control, and the power to legislate in respect to which it ought not to be supposed was intended to be surrendered to the general Government, it is the protection of the people against fraud and deception in the sale of food products. Such legislation may, indeed, indirectly or incidentally affect trade in such products transported from one State to another State. But that circumstance does not show that laws of the character alluded to are inconsistent with the power of Congress to regulate commerce among the States. For, as was said by this court in Sherlock *vs.* Alling, 93 U. S., 99, 103: "In conferring upon Congress the regu- "lation of commerce, it was never intended to cut the States "off from legislating on all subjects relating to the health, "life and safety of their citizens, though the legislation might "indirectly affect the commerce of the country. Legislation, "in a great variety of ways, may affect commerce and persons "engaged in it without constituting a regulation of it within "the meaning of the Constitution. * * * And it may be "said generally that the legislation of a State not directed

" against commerce or any of its regulations, but relating to " the rights, duties and liabilities of citizens, and only indirectly " and remotely affecting the operations of commerce, is of ob- " ligatory force upon citizens within its territorial jurisdiction, " whether on land or water, or engaged in commerce, foreign " or interstate, or in any other pursuit."

Speaking of Leisy *vs.* Hardin, this court said (page 474):—

It must be restrained in its application to the case actually presented for determination, and does not justify the broad contention that a State is powerless to prevent the sale of articles manufactured in or brought from another State and subjects of traffic and commerce, if their sale may cheat the people into purchasing something they do not intend to buy and which is wholly different from what its condition and appearance import.

This court (page 475) quoted with approval what had been said in People *vs.* Arenberg, 105 N. Y., 123, to the effect that—

The statutory prohibition is aimed at a designed and intentional imitation of dairy butter, in manufacturing the new product, and not at a resemblance, in qualities inherent in the articles themselves and common to both.

The opinion concludes with this assimilation of law with morals (page 478):—

We are unwilling to accept this view. We are of opinion that it is within the power of a State to exclude from its markets any compound manufactured in another State, which has been artificially colored or adulterated so as to cause it to look like an article of food in general use, and the sale of which may, by reason of such coloration or adulteration, cheat the general public into purchasing that which they may not intend to buy. The Constitution of the United States does not secure

to any one the privilege of defrauding the public. The deception against which the statute of Massachusetts is aimed is an offense against society; and the States are as competent to protect their people against such offenses or wrongs as they are to protect them against crimes or wrongs of a more serious character. And this protection may be given without violating any right secured by the National Constitution, and without infringing the authority of the general Government. A State enactment forbidding the sale of deceitful imitations of articles of food in general use among the people does not abridge any privilege secured to citizens of the United States, nor, in any just sense, interfere with the freedom of commerce among the several States. It is legislation which "can "be most advantageously exercised by the States themselves." Gibbons *vs.* Ogden, 9 Wheat., 1, 203.

We are not unmindful of the fact—indeed, this court has often had occasion to observe—that the acknowledged power of the States to protect the morals, the health, and safety of their people by appropriate legislation, sometimes touches, in its exercise, the line separating the respective domains of national and State authority. But in view of the complex system of government which exists in this country, "present-"ing," as this court, speaking by Chief Justice Marshall, has said, "the rare and difficult scheme of one general Govern-"ment, whose actions extend over the whole, but which pos-"sesses only certain enumerated powers, and of numerous "State Governments, which retain and exercise all powers not "delegated to the Union," the judiciary of the United States should not strike down a legislative enactment of a State—especially if it has direct connection with the social order, the health and the morals of its people—unless such legislation plainly and palpably violates some right granted or secured by the National Constitution, or encroaches upon the authority delegated to the United States for the attainment of objects of national concern.

The Legislature of Pennsylvania at first tried to protect its citizens by regulations short of prohibition.

It failed. In an honest exercise of its duty to preserve them against deception, it found an article offered to them which had been purposely made to imitate dairy butter. Because this article was a fraudulent imitation, it forbade its sale.

This court has conceded the right, and the duty, of the State, through its legislature, to guard its citizens against deception. Will it say, in the case of an article necessarily deceptive, that its prohibition, because of its deceptiveness, is illegal? Had oleomargarine been offered to the public in its natural, and not in its imitative and disguised appearance, the necessity for legislation would have been greatly diminished. It is not fair to say, as the appellants do say, that the oleomargarine legislation was an effort on the part of the farmers to protect themselves against the sale of an article equally good. It resulted from a determination by those in power, to guard their citizens from deception as to the nature of an article sold under disguise, as to color and flavor, with the intent to deceive.

In Powell *vs.* Pennsylvania, 127 U. S., 685, it was said:—

> Whether the manufacture of oleomargarine, or imitation butter, of the kind described in the statute is, or may be, conducted in such a way, or with such skill and secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients,

are questions of fact and of public policy which belong to the legislative department to determine. * * * The Legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale, or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds other than those produced from unadulterated milk or cream from unadulterated milk to take the place of butter produced from unadulterated milk, will promote the public health and prevent frauds in the sale of such articles.

The appellants (page 9) say :—

The power of the States to regulate the sale of oleomargarine, to prevent artificial coloring calculated to deceive, to require labels to prevent deception, is not challenged. * * * This necessarily involves the broader question as to whether the police power can uphold State legislation which prevents and destroys interstate commerce in any article designed and fit to take the place of any other article of foods sold for what it is, without fraud or deception or imitation, and with full disclosure to the purchaser.

If regulations prove insufficient to punish deception, is not the power vested in the legislature broad enough to punish such deception, if it shall deem it necessary, by actual prohibition of sale?

Oleomargarine, according to the method of its manufacture, may be "fit to take the place of any "other article of food." It is certainly so "designed." The Legislature of Pennsylvania has determined that it is not "sold for what it is," without fraud or deception or imitation, and with full disclosure to the purchaser. In view of what is stated in the text

books, as to the method of manufacture, and the design and intention of the manufacturers, do not the appellants beg their premise, when they say that oleomargarine is sold "with full disclosure to "the purchaser for what it is?"

Oleomargarine cannot be sold in such way that, under the circumstances attending its ultimate consumption, "all possible fraud and deception" will be precluded.

VI. Oleomargarine is a newly-discovered article which is only permitted by the United States, and, (with a very few exceptions), by the States of the Union, to be dealt in under the most severe regulations.

Of course this proposition will be conceded.

VII. In the State of Pennsylvania, for the last twelve years, after a brief period of effort to guard against fraud and unwholesomeness in the manufacture and sale of oleomargarine by regulation, it has been deemed necessary, because of the impossibility otherwise to protect the citizens thereof, absolutely to prohibit any dealing therein.

So far as the citizens of Pennsylvania are concerned, its legislature has always refused to recognize the wholesomeness, or the freedom from deception, of oleomargarine. At first it sought to protect by regulation. In this it failed. It then prohibited simply to protect its citizens in their health and against fraud. In Pennsylvania there has never been an acceptance of oleomargarine as an article of commerce.

VIII. Each State had a right, in the case of a newly-invented food product, to determine for its citizens the question of whether it is wholesome, and not deceptive; neither the Congress of the United States, nor the legislatures of other States, can deprive it of this right.

Perhaps it will be conceded that if there be a *bona fide* apprehension of injury to health, any State may, in the first instance, prohibit the sale of a newly-invented food product. When will a prohibition, in the first instance legal, become illegal? Will the action of Congress or of other States, at a later period, make it such?

Preliminarily it may be said that the Act of 2d August, 1886, was never meant to legalize the dealing, within the limits of any State, in oleomargarine. It expressly extends and applies to persons engaged in the manufacture and sale of oleomargarine, section 3243 of the Revised Statutes, which provides:—

> The payment of any tax imposed by the internal revenue laws for carrying on any trade or business shall not be held to exempt any person from any penalty or punishment provided by the laws of any State for carrying on the same within such State, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such State, or in places prohibited by municipal law.

It seems almost farcical to urge, that Congress has recognized oleomargarine, which it stigmatizes as an "imitation of butter," as a legitimate article of

trade or commerce, with the intent to strike down the legislation of the different States of the Union, in view of what it said in the words just quoted. It has practically said that the laws of the States which punish dealing in oleomargarine, are not to be affected by its enactment.

By the Act of Congress, 2d August, 1886, it is provided :—

> The Commissioner may also decide whether any substance made in the semblance of butter, and intended for human consumption, contains ingredients deleterious to the public health.

Can there be a much more forcible recognition by Congress, of the necessity, for the prevention of injury to the public health, of the supervision of the manufacture? And yet, its officials will never be able properly to supervise the same. Can there be a much stronger recognition of the fact that oleomargarine, as it may, and as it probably will, be manufactured, is not properly an article of commerce?

As we have seen, scarcely a single State of the Union has been willing to recognize it as an article which may be safely or properly dealt in, excepting under extraordinary guards. Some legislatures have deemed one, other legislatures have deemed another, set of guards, necessary; but all have recognized the necessity of some guarding of the manufacture and sale. Is it possible for one State to dictate to another that the guards it deems sufficient shall be by it

adopted? Where all deem it necessary to do something, the extent of the doing must depend upon the judgment, in each case, of the legislature of each State affected.

Can the appellants point to any decision of this court, restricting a legislature in the exercise of its police power, over an article conceded by all to be dangerous, if not rigidly supervised and controlled?

Even if one State does determine that its citizens will be sufficiently protected in their health, and against deception, by the regulations by it prescribed, it is still open for any other State to determine whether its citizens will be protected by such regulations. It must be left unfettered in its exercise of its power to determine what shall be done.

Let us illustrate: Suppose that one-half of the States of the Union determine it to be necessary to prohibit the sale, for food, of an article just discovered and that the other one-half determine that official supervision and control will sufficiently protect their citizens, can Congress say that such an article is an article of commerce and that regulation, or prohibition, by the legislatures, because of its interference with commerce, will be illegal?

In the cases heretofore decided by this court, the articles involved, (one of them was whisky), were those which the whole civilized world had accepted, antecedently to the Federal Constitution, as articles of trade or commerce.

In the case of oleomargarine, a very different situ-

ation is presented. If all the States but one should prohibit its manufacture, because of their belief in its fraudulent and unwholesome character, could Congress declare it to be an article of commerce? Would the will of one State, manufacturing it, be allowed to overrule the determinations of all the others?

The power vested in Congress is to regulate commerce. No power is conferred upon it to determine what are articles of commerce, or to insist that newly-invented food products shall be treated as such.

In United States *vs.* Dewitt, 9 Wallace, 41, it was held that the section of the Internal Revenue Act of 1867, making it a misdemeanor, punishable by fine and imprisonment, to mix for sale, naphtha and illuminating oils, or to sell or offer such mixture for sale, &c., is, in fact, a police regulation, relating exclusively to the internal trade of the States, and that it can only have effect where the legislative authority of Congress excludes, territorially, all State legislation, as for example, in the District of Columbia; that within State limits, it can have no constitutional operation.

IX. Oleomargarine does not belong to the class of universally recognized articles of commerce. Not being within this class, the legislation of Pennsylvania does not affect commerce.

We have discussed this proposition almost as fully as we deem necessary, under some of the preceding heads.

In Leisy *vs.* Hardin, 135 U. S., 110, this court said:—

> Ardent spirits, distilled liquors, ale and beer are subjects of exchange, barter and traffic, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress and the decisions of courts.

Can this be said of oleomargarine?

In the same case, the Chief Justice further said (page 113):—

> Articles in such condition as tend to spread disease are not merchantable, are not legitimate subjects of trade and commerce, and the self-protecting power of each State, therefore, may be rightfully exerted against their introduction, and such exercise of power cannot be considered as a regulation of commerce, prohibited by the Constitution.

Cannot the same thing be said of articles manufactured with the designed purpose of deceiving the public as to their nature? Of articles admittedly dangerous to health, unless manufactured with extreme care and honesty, and of articles universally recognized as those which must be carefully regulated in the method of their manufacture and sale?

In Scott *vs.* Donald, 165 U. S., 91, this court, through Mr. Justice Shiras, said:—

> So long, however, as State legislation continues to recognize wines, beer and spirituous liquors as articles of lawful consumption and commerce, so long must continue the duty of the Federal courts to afford to such use and commerce the same measure of protection, under the Constitution and laws of the United States, as is given to other articles. * * * It is important to observe that the statute before us does not

purport to prohibit either the importation, the manufacture, the sale or the use of intoxicating liquors. * * * In view of these and similar provisions, it is indisputable that whatever else may be said of this Act, it was not intended to prohibit the manufacture, sale and use of intoxicating liquors. On the contrary, liquors and wines are recognized as commodities which may be lawfully made, bought and sold, and must therefore be deemed to be the subject of foreign and interstate commerce.

As late as in Emert *vs.* Missouri, 156 U. S., 318, this court said, through Mr. Justice Gray :—

In the opinion of the majority of the court in 120 U. S., 498, delivered by Mr. Justice Bradley, it was expressly affirmed that a State, although commerce might thereby be incidentally affected, might pass "inspection laws to secure the due "quality and measure of products and commodities," and "laws to regulate or restrict the sale of articles deemed in- "jurious to the health or morals of the community."

In Guy *vs.* Baltimore, 100 U. S., 443, this court said :—

In the exercise of its police powers, a State may exclude from its territory, or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to the health or which would endanger the lives or property of its people. But if the State, under the guise of exerting its police powers, should make such exclusion or prohibition applicable solely to articles of that kind, that may be produced or manufactured in other States, the courts would find no difficulty in holding such legislation to be in conflict with the Constitution of the United States.

X. Non-discriminative legislation, enacted in good faith for the protection of health and the prevention of deception, not hampering the actual transportation of merchandise, is not presumptively void, but is conclusively valid.

In answering a counter proposition by the appellants, we have said about all we care to say under this head.

The question is always one of power. Where that is found to exist, the judgment shown in its exercise can never be supervised.

Either the State legislatures do, or do not, possess the power to enact sanitary provisions for the protection of their citizens. It being conceded that they do possess such power, no exercise of the same, in the absence of fraud, can be held to be presumptively void. In the Powell case it was decided by this court that the legislative judgment upon the question of fact was final. The Legislature of Pennsylvania has decided that oleomargarine as manufactured, and as known to the public, leads to deception and is unwholesome. It is conceded that so far as regards the sale of products originating within its borders this judgment is final. Is it possible that it can be held to possess any different characteristic, because the product condemned may, in some instances, have originated in another State?

In the very recent case of Richmond and A. R. Co. *vs.* Patterson Tobacco Company, 18 Supreme Court Reporter, 335, this court held that:—

A State statute declaring that a common carrier accepting goods for transportation to a point beyond its own terminus assumes an obligation for their safe carriage to that point, unless otherwise provided by a written contract signed by the shipper, merely establishes a rule of evidence, and does not restrict the right of the carrier to limit his obligation by con-

tract, and hence is not, as applied to interstate commerce, a regulation thereof so as to be void under the Federal Constitution.

In that case it was said :—

Of course, in a latitudinarian sense, any restriction as to the evidence of a contract relating to interstate commerce may be said to be a limitation on the contract itself. But this remote effect resulting from the lawful exercise by a State of its power to determine the form in which contracts may be proven, does not amount to a regulation of interstate commerce.

We submit, in conclusion, that so long as this court continues to do what it has ever done in the past, viz., condemn all legislation designed to interfere with trade or commerce, no harm can result from reliance upon the judgment of the legislature of each State, concerning measures calculated to protect health and to prevent fraud.

JOHN G. JOHNSON,

For the Commonwealth of Pennsylvania.

APPENDIX.

I. SPECIAL VERDICT.

"(1.) The defendant, J. Otis Paul, is a resident and citizen "of the Commonwealth of Pennsylvania, and is the duly au- "thorized agent in the city of Philadelphia of Braun & Fitts, "of Chicago, Ill.

"(2.) The said Braun & Fitts are engaged in the manufac- "ture of oleomargarine in the said city of Chicago, and the "State of Illinois, and as such manufacturers have complied "with all the provisions of the Act of Congress of August 3d, "1886, entitled 'An Act defining butter, also imposing a tax " 'upon and regulating the manufacture, sale, importation and " 'exportation of oleomargarine.'

"(3.) The said defendant, as agent aforesaid, is engaged "in business at No. 214 Callowhill Street, in the city of Phila- "delphia, as wholesale dealer in oleomargarine, and was so "engaged on the second day of October, 1893.

"(4.) The said defendant, on the first day of July, 1893, "paid to the Collector of Internal Revenue of the First District "of Pennsylvania the sum of $480, as and for a special tax "upon the business, as agent for Braun & Fitts Company, in "oleomargarine, and obtained from said collector a writing "in the words following:—

"Stamp for		Special Tax
"$480	United States	$480
"Per Year.	Internal Revenue.	Per Year.
"No. A 431.		No. A 431.

"Received from J. Otis Paul and Geo. E. Paul, agents for "the Chicago Butterine Co., the sum of four hundred and

"eighty dollars, for special tax on the business of wholesale "dealer in oleomargarine, to be carried on at 214 Callowhill "street, Philadelphia, state of Pennsylvania, for the period "represented by the coupon or coupons hereto attached.

"[SEAL] WILLIAM H. DOYLE,
"$480 *Collector First District of Pennsylvania.*

"Dated at Philadelphia, Pa., July 1st, 1893.

"The following clauses appear on the margin of the "above:—

"This stamp is simply a receipt for a tax due the govern- "ment, and does not exempt the holder form any penalty or "punishment provided for by the law of any state for carrying "on the said business within such state, and does not au- "thorize the commencement nor the continuance of such bu- "ness contrary to the laws of such state, or in places prohibted "by a municipal law. See section 3243, Revised Statutes "U. S.

"Severe penalties are imposed for neglect or refusal to place "and keep this stamp conspicuously in your establishment or "place of business. Act of August 2d, 1886.

"Attached to this were coupons for each month of the year, "in form as follows:—

"Coupon for special tax on wholesale dealer in oleomar- "garine for October, 1893.

"(5.) On or before the said second day of October, 1893, "the said Braun & Fitts shipped to the said defendant, their "agent aforesaid, at their place of business in Philadelphia a "package of oleomargarine separate and apart from all other "packages, being a tub thereof, containing ten pounds, packed, "sealed, marked, stamped and branded in accordance with the "requirements of the said Act of Congress of August 2d, "1886. The said package was an original package as re-

"quired by said Act, and was of such form, size and weight "as is used by producers or shippers for the purpose of se- "curing both convenience in handling and security in trans- "portation of merchandise between dealers in the ordinary "course of actual commerce, and the said form, size and "weight were adopted in good faith and not for the purpose "of evading the laws of the Commonwealth of Pennsylvania. "Said package being one of a number of similar packages "forming one consignment shipped by the said company to "the said defendant; said packages forming said consignment "were unloaded from the cars and placed in defendant's store "and there offered for sale as an article of food.

"(6.) On the said second day of October, 1893, in the said "city of Philadelphia at the place of business aforesaid, the "said defendant, as wholesale dealer aforesaid, sold to James E. "Crawford the said tub or package mentioned in the fore- "going paragraph, the oleomargarine therein contained re- "maining in the original package, being the same package, "with seals, marks, stamps and brands unbroken, in which it "was packed by the said manufacturer in the said city of "Chicago, Ill., and thence transported into the city of Phila- "delphia and delivered by the carrier to the defendant, and "the said tub was not broken nor opened on the said premises "of the said defendant, and as soon as it was purchased by the "said James E. Crawford it was removed from the said prem- "ises.

"(7.) The oleomargarine contained in said tub was manu- "factured out of an oleaginous substance not produced from "unadulterated milk or cream, and was an article designed to "take the place of butter and sold by the defendant to James "E. Crawford as an article of food, but the fact that the article "was oleomargarine and not butter was made known by the "defendant to the purchaser, and there was no attempt or pur- "pose on the part of the defendant to sell the article as butter

"or any understanding on the part of the purchaser that he "was buying anything but oleomargarine, and the said oleo- "margarine is recognized by the said Act of Congress of Au- "gust 2d, 1886, as an article of commerce.

"(8.) The above transaction specifically found by the jury "is one of many transactions of like character made by the "defendant during the last two years."

II. OPINION OF THE SUPREME COURT OF PENNSYLVANIA.

It is not necessary to the decision of this case that we should enter upon the discussion of the existence and extent of the police power residing in the several States of the Union. It is quite unnecessary to argue that the power of Congress to regulate commerce between the citizens of the different States was not intended to abridge the lawful exercise of the police power by any of the State governments. If judicial decisions can be said to settle any question, these questions are clearly and properly settled by the decisions of the highest tribunal known to our laws; and settled in accordance with the rules laid down in this State since its first organization. In Commonwealth *vs.* Powell, 127 U. S., 678, the right of this State to deal, in the exercise of its police power, with the manufacture and sale of oleomargarine and the validity of the particular statute under consideration in this case were distinctly affirmed. During the last year (1894) a Massachusetts statute relating to the same subject came before the Supreme Court of the United States in Plumley *vs.* Massachusetts, 155 U. S., 461, and was sustained as a lawful exercise of the police power. The defendant in that case had, as the defendant in this case has, a license from the Internal Revenue Department of the United States authorizing him

to deal in oleomargarine. It was held, however, that this did not authorize him to engage in the manufacture or sale of oleomargarine in violation of the State laws lawfully passed forbidding or regulating such manufacture and sale. The dealer in articles which the State in the exercise of its police power places under restrictions, must make his peace with the State in which his business is conducted, as well as with the internal revenue laws of the United States. This proposition the defendant denies. He has made his peace with the tax laws of the United States, but denies the power of the State to regulate or restrict his sales of the commodity in which he deals, and asserts that he is engaged in interstate commerce within the true intent of the constitutional provision conferring upon Congress the power to regulate commerce between the several States.

In determining the question thus raised, it is important to keep in mind the facts found by the special verdict, as follows: 1. The defendant is a resident in and citizen of this State, with a store or place of business at No. 214 Callowhill Street, Philadelphia. 2. He is conducting the sale of oleomargarine as the agent for "Chicago Butterine Company," which is a firm or corporation doing business in Illinois, and is the licensed dealer at No. 214 Callowhill Street. 3. The oleomargarine was not made from milk or cream. It was designed to be used in place of butter. It was sent from Chicago to Philadelphia to be sold as food, and the tub sold to Crawford, which is complained of in this case, was sold to him for use as an article of food. 4. The tub contained ten pounds only, was put up, sealed and stamped at the factory in the State of Illinois, was received in the same form in Philadelphia, and then "placed in defendant's store and offered "for sale as an article of food." 5. This was one of "many "transactions of like character made by the defendant during "the last two years;" or, in other words, this was the way in

which the defendant did business for his non-resident principals, the manufacturers. They put up the article in ten-pound packages suited for the retail trade, and because they do not allow their agents to open or divide these, they treat their trade as wholesale, though in fact they supply the actual consumer and not the retail dealers. Looking now at these facts in the light of the cases cited we shall find every question raised by them has been decided against the defendant by the Supreme Court of the United States except one. The validity of our Act of Assembly has been distinctly affirmed as a lawful exercise of the police power. The fact that an internal revenue license affords the defendant no justification for disregarding a lawful exercise of the police power by the State is stated with equal clearness. The proposition that the judiciary of the United States should not strike down the police power of the States in the exposition of the interstate commerce powers of the general Government, was asserted and abundantly vindicated in Plumley *vs.* Massachusetts, *supra*, decided within the last year. Our statute is directed especially against the sale of oleomargarine as an article of food. The defendant, in willful and flagrant disregard of the letter as well as the spirit of the statute, keeps these tubs, of the commodity manufactured by his principals, at the store in Callowhill Street for sale "as an article of food." He offers them for sale for use as an article of food, and he sold to Crawford the ten-pound tub which is the ground of complaint in this case for use as food. Now, it is very clear that this sale was a violation of our statute. The conviction was eminently proper, therefore, and should be sustained, unless the sale can be justified as one made of an original package within the proper meaning of that phrase. The non-residence of the manufacturer does not play any important part in this case, for he comes into this State to establish a "store" for the sale of his goods, pays the license ex-

acted by the revenue laws, and puts his agent in charge of the sale of his goods from his store, not to the trade, but to customers. We have, therefore, a Pennsylvania store selling its stock of goods to its customers for their consumption, from its own shelves; and unless these goods are in such original packages as the laws of the United States must protect, the sale is clearly punishable under our statute.

We first encountered this question of: What shall constitute an original package within the meaning of our national interstate commerce legislation, in Commonwealth *vs.* Zelt, 138 Pa., 615. A non-resident manufacturer of intoxicating drinks put up his whisky and other liquors in quart and pint bottles adapted for use in the retail trade to consumers. These he sent to an agent in charge of a store rented for the purpose in Washington, Pa. The bottles were corked, some sealing wax put over the cork and the brand or initials of the manufacturer impressed thereon. The bottles so secured were then put in pasteboard boxes or covers, and packed in open boxes or barrels for shipment to the Pennsylvania store. When they were received at the store the bottles were arranged and displayed on the shelves and offered for sale to the consumer as original packages of whisky. Neither the distiller who shipped the whisky nor his agent who sold it had a license to sell intoxicating drinks under the liquor laws of this State, but made sales of whisky and beer by the pint and quart under the pretense that each bottle was an original package of commerce. The learned judge before whom an indictment against the seller of the bottles of liquor was brought to trial submitted the question to the jury whether this method of putting up the liquors in bottles was not adopted as a device to evade the liquor laws of this State. The jury found the fact to be that it was a mere device, and rendered a verdict of guilty. Upon an appeal to this court the ruling of the court below was affirmed, and in speaking on the second assignment of error

we said that whether whisky or beer could be put up in pint bottles and sold by the single bottle as an original package under the protection of the interstate commerce laws, was a question that would be decided when it was squarely raised. The question was next raised in Commonwealth *vs.* Shollenberger, 156 Pa., 201, and its decision became necessary to the disposition of that case. In that case a non-resident manufacturer of oleomargarine had established a store for its sale in Philadelphia and held a license under the internal revenue laws authorizing such sale. His agent sold a tub of "the "goods" to a boarding-house keeper for use in the place of butter on his table.

The defense was that the tub had not been broken or divided by the seller and was therefore an original package within the meaning of the interstate commerce cases. We held that the conclusion did not follow from the fact stated, and attempted to define an "original package" as such a package as was used in good faith by producers and shippers for convenience in handling and security in transportation of their wares in the ordinary course of actual commerce. But we also said that where the size of the package was adapted for the retail trade so that "breaking of bulk" was not necessary to "reduce the goods into the common mass" and fit them for the retail trade, the traffic so conducted was not interstate, but infrastate commerce, or, in other words, the common, every-day, retail traffic of the community in which the store was located. Let us look at the consequences of the adoption of the opposite rule. If a pint bottle of whisky is an original package under the protection of Congress, and can be sold as such regardless of the police legislation of the State, we cannot punish the sale to a minor, to a person of known intemperate habits, to a lunatic, on election days or on the Sabbath. All power over the traffic for police purposes is gone. And why? Because the power to regulate interstate commerce intended to guard against stoppage

along State lines for examination or the collection of customs duties, has been extended by construction until it is made to reach and protect a retail traffic carried on within any State, if the things sold have come into the retailer's store from a non-resident manufacturer or shipper. If this be a sound construction, then the power of a State to restrict or prohibit an injurious traffic does not depend on the deleterious character of the thing sold or the manner in which sales are made or the public or private injury inflicted by the sale, but on the manner in which the thing sold comes into possession of the seller. If he makes the article or buys it of another citizen of the State he cannot sell it without punishment. If he buys it of a non-resident, who sends it to him across the State line, he may sell it with impunity, and the State is powerless to stay his hands or to regulate his sales. A pint of whisky put up in a flask, if made or bought in this State, cannot be sold without a license granted by the courts after an examination into the character of the applicant and his business. The same flask of whisky put up across the border may come as an original package into any community and be sold to any person, whether a minor, a drunkard or a lunatic, under the protection of the Constitution of the United States.

We cannot adopt a construction that seems to us so unnatural and unreasonble, and that would work such absurd and monstrous results. On the contrary, we hold, as we think is held by the recent case of Plumley *vs.* Massachusetts, already referred to, that the mere fact that a police law may affect the trade in articles brought from another State does not amount to an attempt to regulate interstate commerce, or to an assumption of power belonging to Congress. Coming now to the facts of this case we find the alleged "original package of commerce" to be a small tub of oleomargarine containing ten pounds, and in fact sold to a consumer for use as an article of food upon his table. It is

true that the defendant treats his trade as one carried on at wholesale, but the facts of the special verdict show that this is not because he supplies dealers or sells in large quantities for shipment, but because he treats the little tubs and packages he sells his customers as "original packages of com-"merce," and his law-breaking traffic as "interstate commerce." He does not "break bulk" by taking one pound out of a package and weighing it on his scales for the supply of a customer, but requires him to take a whole tub, whether of ten pounds or of two or of one is immaterial, but it must be a whole package as it was put up at the factory. If the pint bottle or the pound package has not been opened and divided before the sale, the contention is that it has not become a part of "the common mass" of property entering into the ordinary business of the citizens of the State, but is an original package under the protection of Congress as interstate commerce. The question to which we are thus brought is the same that was encountered in Commonwealth *vs.* Schollenberger, 156 Pa., 201. It is, whether a package intended and used for the supply of the retail trade is an "original "package" within the protection of the interstate commerce cases?

We held in that case that a manufacturer who puts up his products in packages evidently adapted for and intended to meet the requirements of an unlawful retail trade in another State, and sends them to his own agent in that State for sale to consumers, is not engaged in interstate commerce, but is engaged in an effort to carry on a forbidden business by masquerading in a character to which he has no honest title. We are not dealing with the legislative question. Whether the trade in oleomargarine is injurious and should be restricted is a question that has been decided for us. It has been declared injurious. It has been placed under restrictions. These restrictions have been held to be a valid exercise of the police power both by this court and the Su-

preme Court of the United States. Our question is, whether this valid restriction can be enforced, or whether the transparent trick of putting up oleomargarine in small packages in another State, so that it can be sold at retail to consumers as an article of food, will clothe an unlawful retail traffic with the coat of mail belonging to honest, legitimate, interstate commerce, and set the police laws of the State at defiance. In disposing of this question we hold as follows: First, the character of the package, whether original or not, is a question of fact when there are facts to be passed upon bearing upon this question, and should go to the jury; second, it is a question of law when the facts are agreed upon, or presented by a special verdict as in this case, and should be decided by the court; third, it is fair to presume that a package was intended, by him who devised it, for the purpose for which he uses it in his own business; fourth, a package devised by a non-resident manufacturer, or put up by him adapted for sale at retail to individual consumers, such, for example, as a flask of whisky or a tub or pail or roll of oleomargarine, and actually sold by him or his agent to the consumer for use as an article of food or drink, in violation of the laws of the State where such sales take place, is not an "original package" within the meaning of the law relating to interstate commerce; fifth, the punishment of such sales under the police power of the State is not an interference with the powers of Congress or with the commerce between the States which is protected by the Constitution of the United States.

The judgment is reversed and judgment is now entered on the special verdict in favor of the Commonwealth. The record is remitted that sentence may be imposed according to law.

Reported in 170 Pennsylvania State reports, page 284.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1897.

SCHOLLENBERGER *v.* PENNSYLVANIA.

PAUL *v.* PENNSYLVANIA.

PAUL *v.* PENNSYLVANIA.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

Nos. 86, 87, 88. Argued March 23, 24, 1898. — Decided May 23, 1898.

Oleomargarine has, for nearly a quarter of a century, been recognized in Europe and in the United States as an article of food and commerce, and was recognized as such by Congress in the act of August 2, 1886, c. 840; and, being thus a lawful article of commerce, it cannot be wholly excluded from importation into a State from another State where it was manufactured, although the State into which it was imported may so regulate the introduction as to insure purity, without having the power to totally exclude it.

A sale of a ten pound package of oleomargarine, manufactured, packed, marked, imported and sold under the circumstances set forth in detail in the special verdict in this case, was a valid sale, although made to a person who was himself a consumer; but it is not decided that this right of sale extended beyond the first sale by the importer after its arrival within the State.

The importer had not only a right to sell personally, but he had the right to employ an agent to sell for him, and a sale thus effected was valid.

The right of the importer to sell does not depend upon whether the original package was suitable for retail trade or not, but is the same, whether

Statement of the Case.

to consumers or to wholesale dealers, provided he sells in original packages.

Act No. 21 of the legislature of Pennsylvania, enacted May 21, 1885, enacting that "no person, firm or corporate body shall manufacture out of any oleaginous substance, or any compound of the same, other than that produced from unadulterated milk or of cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk, or cream from the same, or of any imitation or adulterated butter or cheese, nor shall sell or offer for sale, or have in his, her or their possession with intent to sell the same as an article of food" and making such act a misdemeanor, punishable by fine and imprisonment, is invalid to the extent that it prohibits the introduction of oleomargarine from another State, and its sale in the original package.

THE questions in these three cases are the same, and they arise out of the selling of certain packages of oleomargarine.

The plaintiffs in error were indicted for and convicted of a violation of a statute of Pennsylvania prohibiting such sale. The act (No. 25) was passed on the 21st of May, 1885, and is to be found in the volume of the laws of Pennsylvania for that year, page 22. It provides as follows:

"That no person, firm or corporate body shall manufacture out of any oleaginous substance or any compound of the same, other than that produced from unadulterated milk or of cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk, or cream from the same, or of any imitation or adulterated butter or cheese, nor shall sell or offer for sale, or have in his, her or their possession with intent to sell the same as an article of food."

A violation of the act is made a misdemeanor and punishable by fine and imprisonment.

The jury found a special verdict in each case. The only difference between the facts stated in the verdict in Number 86 and those contained in the other cases is that in the latter the package sold was ten pounds instead of forty pounds and was sold by the plaintiffs in error in those cases as agents of a different principal, carrying on the same kind of business in the State of Illinois, and the package was sold to a different person and upon a different date.

Statement of the Case.

The following facts were set out in the special verdict in Number 86:

"(1.) The defendant, George Schollenberger, is a resident and citizen of the Commonwealth of Pennsylvania, and is the duly authorized agent in the city of Philadelphia of the Oakdale Manufacturing Company of Providence, Rhode Island.

"(2.) The said Oakdale Manufacturing Company is engaged in the manufacture of oleomargarine in the said city of Providence and State of Rhode Island, and as such manufacturer has complied with all the provisions of the act of Congress of August 2, 1886, entitled 'An act defining butter; also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine.'

"(3.) The said defendant, as agent aforesaid, is engaged in business at 219 Callowhill street, in the city of Philadelphia, as wholesale dealer in oleomargarine, and was so engaged on the 2d day of October, 1893, and is not engaged in any other business, either for himself or others.

"(4.) The said defendant, on the 1st day of July, 1893, paid to the collector of internal revenue of the first district of Pennsylvania the sum of four hundred and eighty dollars as and for a special tax upon the business, as agent for the Oakdale Manufacturing Company, in oleomargarine, and obtained from said collector a writing in the words following:

'Stamp for		Special tax,
$480	United States	$480
per year.	internal revenue.	per year.
No. A 434.		No. A 434.

"'Received from George Schollenberger, agent for the Oakdale Manufacturing Company, the sum of four hundred and eighty dollars for special tax on the business of wholesale dealer in oleomargarine, to be carried on at 219 Callowhill street, Philadelphia, State of Pennsylvania, for the period represented by the coupon or coupons hereto attached.

"'Dated at Philadelphia, Pa., July first, 1893.

"'[SEAL.] WILLIAM H. DOYLE,

"'$480. *Collector, First District of Penna.*'

"The following clauses appear on the margin of the above:

"'This stamp is simply a receipt for a tax due the Government, and does not exempt the holder from any penalty or punishment provided for by the law of any State for carrying on the said business within such State, and does not authorize the commencement nor the continuance of such business contrary to the laws of such State or in places prohibited by a municipal law. (See section 3243, Revised Statutes, U. S.)

"'Severe penalties are imposed for neglect or refusal to place and keep this stamp conspicuously in your establishment or place of business. Act of August 2, 1886.'

"Attached to this were coupons for each month of the year in form as follows:

"'Coupon for special tax on wholesale dealer in oleomargarine for October, 1893.'

"(5.) On or before the said second day of October, 1893, the said Oakdale Manufacturing Company shipped to the said defendant, their agent aforesaid, at their place of business in Philadelphia, a package of oleomargarine separate and apart from all other packages, being a tub thereof containing forty pounds, packed, sealed, marked, stamped and branded in accordance with the requirements of the said act of Congress of August second, 1886. The said package was an original package, as required by said act, and was of such form, size and weight as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce, and the said form, size and weight were adopted in good faith and not for the purpose of evading the laws of the Commonwealth of Pennsylvania, said package being one of a number of similar packages forming one consignment shipped by the said company to the said defendant. Said packages forming said consignment were unloaded from the cars and placed in defendant's store and then offered for sale as an article of food.

"(6.) On the said second day of October, 1893, in the said city of Philadelphia, at the place of business aforesaid, the said defendant, as wholesale dealer aforesaid, sold to James

Anderson the said tub or package mentioned in the foregoing paragraph, the oleomargarine therein contained remaining in the original package, being the same package, with seals, marks, stamps and brands unbroken, in which it was packed by the said manufacturer in the said city of Providence, Rhode Island, and thence transported into the city of Philadelphia and delivered by the carrier to the defendant; and the said tub was not broken nor opened on the said premises of the said defendant, and as soon as it was purchased by the said James Anderson it was removed from the said premises.

"(7.) The oleomargarine contained in said tub was manufactured out of an oleaginous substance not produced from unadulterated milk or cream, and was an article designed to take the place of butter, and sold by the defendant, to James Anderson as an article of food; but the fact that the article was oleomargarine and not butter was made known by the defendant to the purchaser, and there was no attempt or purpose on the part of the defendant to sell the article as butter, or any understanding on the part of the purchaser that he was buying anything but oleomargarine, and the said oleomargarine is recognized by the said act of Congress of August 2, 1886, as an article of commerce.

"(8.) The above transaction specifically found by the jury is one of many transactions of like character made by the defendant during the last two years."

Upon this special verdict the trial court directed judgment to be entered for the defendant. The case was taken by the Commonwealth to the Supreme Court of the State, where, after argument, the judgment was reversed and judgment was entered in favor of the Commonwealth, and the record remanded that sentence might be imposed by the court below. The plaintiffs in error have brought these judgments of conviction before this court for review by virtue of writs of error.

The opinion of the Supreme Court of the State is to be found reported under the name of *Commonwealth* v. *Paul*, in 170 Penn. St. 284.

Mr. William D. Guthrie for plaintiffs in error. *Mr. Richard C. Dale*, *Mr. Henry R. Edmunds* and *Mr. Albert H. Veeder* were on his brief.

Mr. John G. Johnson for defendant in error.

Mr. Justice Peckham, after stating the facts, delivered the opinion of the court.

Counsel in behalf of the Commonwealth rests the validity of the statute in question upon two principal grounds:

(1.) That oleomargarine is a newly invented or discovered article, and that each State has the right in the case of a newly invented or discovered food product to determine for its citizens the question whether it is wholesome and non-deceptive, and neither the Congress of the United States nor the legislatures of other States can deprive it of this right, and that being such newly discovered article it does not belong to the class universally recognized as articles of commerce, and hence the legislation of Pennsylvania does not regulate or affect commerce; that non-discriminative legislation enacted in good faith for the protection of health and the prevention of deception, not hampering the actual transportation of merchandise, is not presumptively void but is conclusively valid.

(2.) That if the right of citizens of another State to send oleomargarine into the Commonwealth of Pennsylvania be admitted, it can only be introduced in original packages suitable for wholesale trade, and where the article imported is intended and used for the supply of the retail trade or is sold by retail directly to the consumer, the package in which it is imported from another State is not an "original package" within the protection of the interstate commerce provision of the Constitution of the United States.

These are the main grounds upon which the conviction is sought to be sustained. The Supreme Court of the State upheld the statute upon the ground that it was a legitimate exercise of the police power of the State not inconsistent with the right of the owner of the product to bring it within the State

in appropriate packages suitable for sale to the wholesale dealer and not intended for sale at retail by the importer to the consumer, and that in the cases under consideration the packages were not wholesale original packages and their sale amounted to a mere retail trade.

Upon the first ground for sustaining the conviction in these cases the argument upon the part of the Commonwealth runs somewhat as follows: It may be admitted that actually pure oleomargarine is not dangerous to the public health, but whether it be pure depends upon the method of its manufacture, and its purity cannot be ascertained by any superficial examination, and any certain and effective supervision of the method of its manufacture is impossible. It is manufactured to imitate in its appearance butter, with a view to deceiving the ultimate consumer as to its character, and this deception cannot be avoided by coverings, labels or marks upon the product; the legislature of Pennsylvania was therefore so far justified in protecting its citizens against oleomargarine by prohibiting its sale; that the legislation in question does not discriminate in favor of the citizens of Pennsylvania or in any manner against any particular State or any particular manufacturer of the article, and, as there is nothing in the case tending to prove the contrary, it must be assumed that the legislation was enacted in good faith for the protection of the health of the citizens and for the prevention of deception, and as such legislation did not hamper the actual transportation of merchandise, the statute must be held to be within the power of the legislature to enact, and is therefore valid; at all events, the State has a right in cases of newly invented food products to determine for its citizens the question whether they are wholesome and non-deceptive, and that oleomargarine is one of that class of products, and is necessarily subject to the right of the State either to regulate or absolutely to prohibit its sale.

In the examination of this subject the first question to be considered is whether oleomargarine is an article of commerce? No affirmative evidence from witnesses called to the stand and speaking directly to that subject is found in the record.

We must determine the question with reference to those facts which are so well and universally known that courts will take notice of them without particular proof being adduced in regard to them, and also by reference to those dealings of the commercial world which are of like notoriety.

Any legislation of Congress upon the subject must, of course, be regarded by this court as a fact of the first importance. If Congress has affirmatively pronounced the article to be a proper subject of commerce, we should rightly be influenced by that declaration. By reference to the statutes we discover that Congress in 1886 passed "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine." Act of August 2, 1886, c. 840, 24 Stat. 209. In that statute we find that Congress has given a definition of the meaning of oleomargarine and has imposed a special tax on the manufacturers of the article, on wholesale dealers and upon retail dealers therein, and the provisions of the Revised Statutes in relation to special taxes are, so far as applicable, made to extend to the special taxes imposed by the third section of the act, and to the persons upon whom they are imposed. Manufacturers are required to file with the proper collector of internal revenue such notices, and to keep such books and conduct their business under such supervision as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation require. Provision is made for the packing of oleomargarine by the manufacturer in packages containing not less than ten pounds and marked as prescribed in the act, and it provides that all sales made by manufacturers of oleomargarine and wholesale dealers in oleomargarine shall be in the original stamped packages. A tax of two cents per pound is laid upon oleomargarine, to be paid by the manufacturer, and the tax levied is to be represented by coupon stamps. Oleomargarine imported from foreign countries is taxed, in addition to the import duty imposed on the same, an internal revenue tax of fifteen cents per pound. Provision is made for warehousing, and a penalty imposed for selling the oleomargarine thus imported if not properly stamped. Provision is

also made for the appointment of an analytical chemist and microscopist by the Secretary of the Treasury, and such chemist or microscopist may examine the different substances which may be submitted in contested cases, and the Commissioner of Internal Revenue is to decide in such cases as to the taxation, and his decision is to be final. The Commissioner is also empowered to decide "whether any substance made in imitation or semblance of butter, and intended for human consumption, contains ingredients deleterious to the public health; but in case of doubt or contest his decisions in this class of cases may be appealed from to a board hereby constituted for the purpose, composed of the Surgeon General of the Army, the Surgeon General of the Navy and the Commissioner of Agriculture, and the decisions of this board shall be final in the premises." Provision is also made for the removal of oleomargarine from the place of its manufacture for export to a foreign country without payment of tax or affixing of stamps thereto, and there is a penalty denounced against any person engaged in carrying on the business of oleomargarine who should defraud or attempt to defraud the United States of the tax.

This act shows that Congress at the time of its passage in 1886 recognized the article as a proper subject of taxation and as one which was the subject of traffic and of exportation to foreign countries and of importation from such countries. Its manufacture was recognized as a lawful pursuit, and taxation was levied upon the manufacturer of the article, upon the wholesale and retail dealers therein, and also upon the article itself.

As to the extent of the manufacture and its commercial nature, it is not improper to refer to the reports of the Secretary of the Treasury, which show that the tax receipts from its manufacture and sale in the United States under the act above mentioned, during the nine years beginning with 1887, amounted to over ten million dollars.

When we come to an inquiry as to the properties of oleomargarine and of what the substance is composed, we find that answers to such inquiries are to be found in the various

encyclopædias of the day, and in the official reports of the Commissioner of Agriculture and in the legal reports of cases actually decided in the courts of the country. In brief, every intelligent man knows its general nature, and that it is prepared as an article of food, and is dealt in as such to a large extent throughout this country and in Europe.

Upon reference to the Encyclopædia Britannica it is said that "pure oleomargarine butter is said to contain every element that enters into cream butter, and to keep pure much longer; but there is the defect of not knowing when it is pure or what injurious ingredients, or objectionable processes, may be used in its manufacture by irresponsible parties." The article also says "we append a comparative analysis of natural and artificial butter, which shows that, when properly made, the latter is a wholesome and satisfactory substitute for the former."

There is contained in the 17th volume of the Encyclopædia Britannica an extract from a report by the secretary of the British Embassy at Washington, in 1880, describing the method of obtaining oleomargarine oil. This shows the article was then well known.

In *Ex parte Scott and others*, the Circuit Court for the Eastern District of Virginia, (66 Fed. Rep. 45,) speaking by Hughes, District Judge, said: "It is a fact of common knowledge that oleomargarine has been subjected to the severest scientific scrutiny, and has been adopted by every leading government in Europe, as well as America, for use by their armies and navies. Though not originally invented by us, it is a gift of American enterprise and progressive invention to the world. It has become one of the conspicuous articles of interstate commerce, and furnishes a large income to the general government annually. . . . It is entering rapidly into domestic use, and the trade in oleomargarine has become large and important. The attention of the national government has been attracted to it as a source of revenue. . . . Provincial prejudice against this now staple of commerce is natural, but a city of the size and prospects of Norfolk as a world's *entrepot* ought not to be foremost in manifesting such a prejudice."

In *People* v. *Marx*, 99 N. Y. 377, 381, which was a prosecution under the New York statute (Chap. 202, Laws of 1884), April 24, 1884, prohibiting the manufacture or sale of oleomargarine, the Court of Appeals of New York held the act unconstitutional. It appears from the opinion that on the trial of that action "it was proved on the part of the defendant by distinguished chemists that oleomargarine was composed of the same elements as dairy butter. That the only difference between them was that it contained a smaller proportion of fatty substance known as butterine. That this butterine exists in dairy butter only in a small proportion — from three to six per cent. That it exists in no other substance than butter made from milk, and it is introduced to oleomargarine butter by adding to oleomargarine stock some milk, cream or butter, and churning, and when this is done it has all the elements of natural butter, but there must always be a smaller percentage of butterine in the manufactured product than in the butter made from milk. The only effect of the butterine is to give flavor to the butter, having nothing to do with its wholesomeness. That the oleaginous substances in the oleomargarine are substantially identical with those produced from milk or cream. Professor Chandler testified that the only difference between the two articles was that dairy butter had more butterine. That oleomargarine contained not over one per cent of that substance, while dairy butter might contain four or five per cent, and that if four or five per cent of butterine were added to the oleomargarine, there would be no difference; it would be butter; irrespective of the sources, they would be the same substances. According to the testimony of Professor Morton, whose statement was not controverted or questioned, oleomargarine, so far from being an article devised for purposes of deception in trade, was devised in 1872 or 1873 by an eminent French scientist, who had been employed by the French government to devise a substitute for butter." This extract from the opinion in the New York case, speaking of the testimony given before the trial judge, is not quoted for the purpose of proving the facts therein stated, but for the purpose of showing that as

long ago as the time when that case was decided — June, 1885 — the article was then well known as an article of food, and manufactured as a substitute for butter, and we may notice from some of the histories of the article the fact (which is stated in the opinion) that it was first devised as long ago as 1872 or 1873 by a French gentleman who had been employed by the French government to devise a substitute for butter The article is a subject of export, and is largely used in foreign countries. Upon all these facts we think it apparent that oleomargarine has become a proper subject of commerce among the States and with foreign nations.

The general rule to be deduced from the decisions of this court is that a lawful article of commerce cannot be wholly excluded from importation into a State from another State where it was manufactured or grown. A State has power to regulate the introduction of any article, including a food product, so as to insure purity of the article imported, but such police power does not include the total exclusion even of an article of food.

In *Minnesota* v. *Barber*, 136 U. S. 313, it was held that an inspection law relating to an article of food was not a rightful exercise of the police power of the State if the inspection prescribed were of such a character or if it were burdened with such conditions as would wholly prevent the introduction of the sound article from other States. This was held in relation to the slaughter of animals whose meat was to be sold as food in the State passing the so-called inspection law. The principle was affirmed in *Brimmer* v. *Rebman*, 138 U. S. 78, and in *Scott* v. *Donald*, 165 U. S. 58, 97.

Is the rule altered in a case where the inspection or analysis of the article to be imported is somewhat difficult and burdensome? Can the pure and healthy food product be totally excluded on that account? No case has gone to that extent in this court. The nearest approach to it was the case of *Peirce* v. *New Hampshire*, 5 How. 504, involving the importation of intoxicating liquors. But in *Leisy* v. *Hardin*, 135 U. S. 100, 125, the New Hampshire case was overruled, and it was stated by the present Chief Justice, in speaking for the court, that

"whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by state laws amounting to regulations while they retain that character; although, at the same time, if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a State the power to exclude, directly or indirectly, articles so situated, without Congressional permission, is to concede to a majority of the people of a State, represented in the state legislature, the power to regulate commercial intercourse between the States by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States represented in Congress, and its possession by the latter was considered essential to that more perfect union which the Constitution was adopted to create."

To the same effect we think is the case of *Railroad Company* v. *Husen*, 95 U. S. 465, 469, in which it was said that "whatever may be the power of a State over commerce that is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations." The court, therefore, while conceding the right of the State to enact reasonable inspection laws to prevent the importation of diseased cattle, held the law of Missouri there under consideration to be invalid, because it prohibited absolutely the introduction of Texas cattle during the time named in the act, even though they were perfectly healthy and sound.

The court said that a State could not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce. Reasonable and appropriate laws for the inspection of articles, including food products, were admitted to be valid, but absolute prohibition of an unadulterated, healthy and pure article has never been permitted as a remedy against the importation of that which was adulterated and therefore unhealthy or impure.

We do not think the fact that the article is subject to be adulterated by dishonest persons, in the course of its manufacture, with other substances, which it is claimed may in some instances become deleterious to health, creates the right in any State through its legislature to forbid the introduction of the unadulterated article into the State. The fact that the article is liable to adulteration in the course of manufacture, and that the articles with which it may be mixed may possibly and under some circumstances be deleterious to the health of those who consume it, is known to us by means of various references to the subject in books and encyclopædias, but there was no affirmative evidence offered on the trial to prove the fact. From these sources of information it may be admitted that oleomargarine in the course of its manufacture may sometimes be adulterated by dishonest manufacturers with articles that possibly may become injurious to health. Conceding the fact, we yet deny the right of a State to absolutely prohibit the introduction within its borders of an article of commerce, which is not adulterated and which in its pure state is healthful, simply because such an article in the course of its manufacture may be adulterated by dishonest manufacturers for purposes of fraud or illegal gains. The bad article may be prohibited, but not the pure and healthy one.

In the execution of its police powers we admit the right of the State to enact such legislation as it may deem proper, even in regard to articles of interstate commerce, for the purpose of preventing fraud or deception in the sale of any commodity and to the extent that it may be fairly necessary to prevent the introduction or sale of an adulterated article within the limits of the State. But in carrying out its purposes the State cannot absolutely prohibit the introduction within the State of an article of commerce like pure oleomargarine. It has ceased to be what counsel for the Commonwealth has termed it, a newly discovered food product. An article that has been openly manufactured for nearly a quarter of a century, where the ingredients of the pure article are perfectly well known and have been known for a number of years, and where the general process of manufacture has been known

for an equal period, cannot truthfully be said to be a newly discovered product within the proper meaning of the term as here used. The time when a newly discovered article ceases to be such cannot always be definitely stated, but all will admit that there does come a period when the article cannot be so described. In this particular case we have no difficulty in holding that oleomargarine has so far ceased to be a newly discovered article as that its nature, mode of manufacture, ingredients and effect upon the health are and have been for many years as well known as almost any article of food in daily use. Therefore if we admit that a newly discovered article of food might be wholly prohibited from being introduced within the limits of a State, while its properties, whether healthful or not, were still unknown, or in regard to which there might still be doubt, yet this is not the case with oleomargarine. If properly and honestly manufactured it is conceded to be a healthful and nutritious article of food. The fact that it may be adulterated does not afford a foundation to absolutely prohibit its introduction into the State. Although the adulterated article may possibly in some cases be injurious to the health of the public, yet that does not furnish a justification for an absolute prohibition. A law which does thus prohibit the introduction of an article like oleomargarine within the State is not a law which regulates or restricts the sale of articles deemed injurious to the health of the community, but is one which prevents the introduction of a perfectly healthful commodity merely for the purpose of in that way more easily preventing an adulterated and possibly injurious article from being introduced. We do not think this is a fair exercise of legislative discretion when applied to the article in question.

It is claimed, however, that the very statute under consideration has heretofore been held valid by this court in the case of *Powell* v. *Pennsylvania*, 127 U. S. 678. That case did not involve rights arising under the commerce clause of the Federal Constitution. The article was manufactured and sold within the State, and the question was one as to the police power of the State acting upon a subject always

within its jurisdiction. The plaintiff in error was convicted of selling within the Commonwealth two cases containing five pounds each of an article of food designed to take the place of butter, the sale having taken place in the city of Harrisburg, and it was part of a quantity manufactured in and, as alleged, in accordance with the laws of the Commonwealth. The plaintiff in error claimed that the statute under which his conviction was had was a violation of the Fourteenth Amendment to the Constitution of the United States. This court held that the statute did not violate any provision of that Amendment, and therefore held that the conviction was valid.

The *Powell case* did not and could not involve the rights of an importer under the commerce clause. The right of a State to enact laws in relation to the administration of its internal affairs is one thing, and the right of a state to prevent the introduction within its limits of an article of commerce is another and a totally different thing. Legislation which has its effect wholly within the State and upon products manufactured and sold therein might be held valid as not in violation of any provision of the Federal Constitution, when at the same time legislation directed towards prohibiting the importation within the State of the same article manufactured outside of its limits might be regarded as illegal because in violation of the rights of citizens of other States arising under the commerce clause of that instrument.

Referring what is said in the opinion in *Powell's case* to the facts upon which the case arose, and in regard to which the opinion was based and the case decided, there is nothing whatever inconsistent with that opinion in holding, as we do here, that oleomargarine is a legitimate subject of commerce among the States, and that no State has a right to totally prohibit its introduction in its pure condition from without the State under any exercise of its police power. The legislature of the State has the power in many cases to determine as a matter of state policy whether to permit the manufacture and sale of articles within the State or to entirely forbid such manufacture and sale, so long as the legislation is confined to the manufacture

and the sale within the State. Those are questions of public policy which, as was said in the case of *Powell*, belong to the legislative department to determine; but the legislative policy does not extend so far as to embrace the right to absolutely prohibit the introduction within the limits of the State of an article like oleomargarine, properly and honestly manufactured.

The *Powell case* was, in the opinion of the court, governed in its important aspect by that of *Mugler* v. *Kansas*, 123 U. S. 623, in which case it was said that it did not involve any question arising under the commerce clause of the Constitution of the United States. The last cited case was followed in *Kidd* v. *Pearson*, 128 U. S. 1.

Nor is the question determined adversely to this view in the case of *Plumley* v. *Massachusetts*, 155 U. S. 462. The statute in that case prevented the sale of this substance in imitation of yellow butter produced from pure unadulterated milk or cream of the same, and the statute contained a proviso that nothing therein should be "construed to prohibit the manufacture or sale of oleomargarine in a separate or distinct form and in such manner as will advise the consumer of its real character, free from coloration or ingredients that cause it to look like butter." This court held that a conviction under that statute for having sold an article known as oleomargarine, not produced from unadulterated milk or cream, but manufactured *in imitation of yellow butter produced from pure unadulterated milk or cream, was valid.* Attention was called in the opinion to the fact that the statute did not prohibit the manufacture or sale of all oleomargarine, but only such as was colored in imitation of yellow butter produced from unadulterated milk or cream of such milk. If free from coloration or ingredient that caused it to look like butter, the right to sell it in a separate and distinct form and in such manner as would advise the consumer of the real character was neither restricted nor prohibited. The court held that under the statute the party was only forbidden to practice in such matters a fraud upon the general public; that the statute seeks to suppress false pretences and to promote fair dealing in the

sale of an article of food, and that it compels the sale of oleomargarine for what it really is by preventing its sale for what it is not; that the term "commerce among the States" did not mean a recognition of a right to practise a fraud upon the public in the sale of an article even if it had become the subject of trade in different parts of the country. It was said that the Constitution of the United States did not take from the States the power of preventing deception and fraud in the sale within their respective limits of articles, in whatever State manufactured, and that that instrument did not secure to any one the privilege of committing a wrong against society.

It will thus be seen that the case was based entirely upon the theory of the right of a State to prevent deception and fraud in the sale of any article, and that it was the fraud and deception contained in selling the article for what it was not, and in selling it so that it should appear to be another and a different article, that this right of the State was upheld. The question of the right to totally prohibit the introduction from another State of the pure article did not arise, and, of course, was not passed upon. The act of Congress, above cited, was referred to by the counsel for the appellant in the *Plumley case* as furnishing a full system of legislation upon the subject, and he claimed that it excluded any legislation on the same subject by the State, but it was held that there was no ground to suppose that Congress intended by that enactment to interfere with the exercise by the States of any authority they could rightfully exercise over the sale within their respective limits of the article defined as oleomargarine, and, as section 3243 of the Revised Statutes was referred to in the act, it was held that the section was incorporated in the act for the purpose of making it clear that Congress did not intend to restrict the power of the States over the subject of the manufacture and sale of oleomargarine within their respective limits.

The taxes prescribed by that act were held to have been imposed for national purposes, and their imposition did not give authority to those who paid them to engage in the manufacture or sale of oleomargarine within any State which law-

fully forbade such manufacture or sale, or to disregard any regulations which a State might lawfully prescribe in reference to that article. It was also held that the act of Congress was not intended as a regulation of commerce among the States.

By the reference which we have already made to this statute we have not intended to claim that it was a regulation of commerce among the States further than the provisions of the act distinctly applied to its manufacture and sale. We refer to it for the purpose of showing that the article itself was therein recognized as a proper and lawful subject of commerce with foreign nations and among the several States under such lawful regulations as the State might choose to impose. We think that what Congress thus taxes and recognizes as a proper subject of commerce cannot be totally excluded from any particular State simply because the State may choose to decide that for the purpose of preventing the importation of an impure or adulterated article it will not permit the introduction of the pure and unadulterated article within its borders upon any terms whatever.

We are therefore of opinion that the first ground for upholding the conviction in these cases cannot be sustained.

Nor do we think the conviction can be sustained upon the ground taken in the opinion of the Supreme Court of Pennsylvania.

The question in regard to packing the oleomargarine first arose in the case of *Commonwealth* v. *Schollenberger*, 156 Penn. St. 201. The defendant in that case was an agent of a non-resident manufacturer of oleomargarine, and he sold at his store in Pennsylvania a package of the article weighing eighty pounds, made and stamped and branded in Rhode Island for use as an article of food. It was held that the case did not show that the sales were made in the original package of commerce. And it was said that a jury would be justified in finding that the mode of putting up the package was not adapted to meet the requirements of actual interstate commerce, but the requirements of an unlawful interstate retail trade. But the special verdict in this case shows what the

court said was lacking in the case just cited, for it appears in the verdict that the package in which the oleomargarine was sold was an original package, as required by the act of Congress, and was of such "form, size and weight as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce, and the said form, size and weight were adopted in good faith, and not for the purpose of evading the laws of the Commonwealth of Pennsylvania, said package being one of a number of similar packages forming one consignment shipped by the said company to the said defendant." It also appears from the special verdict that the defendant was engaged in business in the city of Philadelphia as a wholesale dealer in oleomargarine as agent for the manufacturer; that he had paid the special tax upon the business as a wholesale dealer, and had otherwise complied with all the requirements of the act of Congress, and the article was openly sold as oleomargarine, and that fact was made known to the purchaser, and he understood that he was buying oleomargarine, and as soon as the tub was purchased it was removed unbroken from the place of sale by the purchaser thereof.

Upon the facts found in the special verdict, it is said in the opinion of the court below, 170 Penn. St. 291, that "it is very clear that this sale was a violation of our statute. The conviction was eminently proper, therefore, and should be sustained, unless the sale can be justified as one made of an original package within the proper meaning of that phrase. The non-residence of the manufacturer does not play any important part in this case, for he comes into this State to establish a store for the sale of his goods, pays the license exacted by the revenue laws, and puts his agent in charge of the sale of his goods from his store, not to the trade, but to customers. We have, therefore, a Pennsylvania store selling its stock of goods to its customers for their consumption from its own shelves; and unless these goods are in such original packages as the laws of the United States must protect, the sale is clearly punishable under our statute. . . . The

question is whether a package intended and used for the supply of the retail trade is an 'original package' within the protection of the interstate commerce cases."

What are the rights of one engaged in interstate commerce in regard to the introduction of a lawful article of commerce into a State? Those rights have been declared by various decisions of this court, some of them made at a very early date, and coming down to the present time.

In the leading case of *Gibbons* v. *Ogden*, 9 Wheat. 1, 193, it was said by Marshall, Chief Justice, that the commerce clause extends to every species of commercial intercourse among the several States, and that it does not stop at the external boundary of a State, and that this power to regulate included the power to prescribe the rule by which commerce is to be governed, and it was held that navigation was included within that power.

In *Brown* v. *Maryland*, 12 Wheat. 419, it was stated that this power to regulate commerce could not be stopped at the external boundary of a State, but must enter its interior, and that if the power reached the interior of the State and might be there exercised, it must be capable of authorizing the sale of those articles which it introduces. It was said that "sale is the object of importation and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce."

Years after the decision of the last case and after many other decisions had been made upon the general subject of the commerce clause, this court in *Bowman* v. *Chicago & Northwestern Railway*, 125 U. S. 465, held that the State could not, for the purpose of protecting its people against the evils of intemperance, pass an act which regulated commerce by forbidding any common carrier to bring intoxicating liquors into the State from another State or Territory, excepting upon conditions mentioned in the act. Such act was held to be repugnant to the Constitution of the United States as af-

fecting interstate commerce in an essential and vital part. But whether the right to transport an article of commerce from one State to another included by necessary implication the right of the consignee to sell it in unbroken packages at the place where the transportation terminated was not decided. In *Brown* v. *Maryland*, it was said that the right of transportation did include the right to sell, as to foreign commerce, and in the course of his opinion Chief Justice Marshall said that the conclusion would be the same in the case of commerce among the States; but as it was not necessary to express any opinion upon the point, it was simply held in the *Bowman case* that the power to regulate or forbid the sale of a commodity after it had been brought into a State does not carry with it the right and power to prevent its introduction by transportation from another State.

The case of *Leisy* v. *Hardin*, 135 U. S. 100, 124, went a step further than the *Bowman case*, and held that the importer had the right to sell in a State into which he brought the article from another State in the original packages or kegs, unbroken and unopened, notwithstanding a statute of the State prohibiting the sale of such articles except for the purposes therein named and under a license from the State. Such a statute was held to be unconstitutional as repugnant to the clause of the Constitution granting power to Congress to regulate commerce with foreign nations and among the several States. Mr. Chief Justice Fuller, in speaking for the court, said: "Under our decision in *Bowman* v. *Chicago & Northwestern Railway*, they had the right to import this beer into that State, and in the view which we have expressed, they had the right to sell it, by which act alone it would become mingled in the common mass of property within the State. Up to that point of time, we hold that in the absence of Congressional permission to do so, the State had no power to interfere, by seizure or any other action, in prohibition of importation and sale by the foreign or non-resident importer." The right of the State to prohibit the sale in the original package was denied in the absence of any law of Congress upon the subject permitting the State to prohibit such sale.

There is no such law of Congress relating to articles like oleomargarine. Such articles are therefore in like condition as were the liquors in the cases above cited.

Subsequent to the decision in the *Leisy case* and on the 8th of August, 1890, c. 728, 26 Stat. 313, Congress passed an act commonly known as the Wilson act, which provided that upon the arrival in any State or Territory of the intoxicating liquors transported therein they should be subject to the operation and effect of the laws of the State or Territory enacted in the exercise of its police power to the same extent and in the same manner as though such liquors had been produced in such State or Territory, and that they should not be exempt therefrom by reason of being introduced therein in original packages or otherwise. This was held to be a valid and constitutional exercise of the power conferred upon Congress. *In re Rahrer, Petitioner*, 140 U. S. 545. In the absence of Congressional legislation, therefore, the right to import a lawful article of commerce from one State to another continues until a sale in the original package in which the article was introduced into the State.

The case of *Emert* v. *Missouri*, 156 U. S. 296, involved the validity of a statute of Missouri providing that peddlers of goods, going from place to place within the State to sell them, should take out and pay for licenses. The statute was held not to violate the commerce clause of the Constitution of the United States because it made no discrimination between residents or products of the State and those of other States. The conviction of the plaintiff in error for a violation of the statute was upheld, although he was an agent of a corporation which manufactured the property in another State and sent it to him to sell as its agent. It was held to be within the police power of the State to regulate the occupation of itinerant peddlers and to compel them to obtain licenses to practise their trade, and such power had been exerted from the earliest times. The remark of Chief Justice Marshall in *Brown* v. *Maryland*, *supra*, was quoted, that "the right of sale may very well be annexed to importation, without annexing to it also the privilege of using the officers licensed by the

State to make sales in a peculiar way." (Page 313.) It was the privilege of selling in a peculiar way, as a peddler, which was licensed in the *Emert case*, and such a person, it was therein decided, could properly be made to pay a license for selling in that way an article manufactured in another State and sent into Missouri, as well as for selling in the same way articles manufactured in Missouri, so long as there was no discrimination between the two classes of goods.

The *Emert case* does not overrule or affect the cases above cited as to the right to sell.

We are not aware of any such distinction as is attempted to be drawn by the court below in these cases between a sale at wholesale to individuals engaged in the wholesale trade or one at retail to the consumer. How small may be an original package it is not necessary to here determine. We do say that a sale of a ten pound package of oleomargarine, manufactured, packed, marked, imported and sold under the circumstances set forth in detail in the special verdict, was a valid sale, although to a person who was himself a consumer. We do not say or intimate that this right of sale extended beyond the first sale by the importer after its arrival within the State. *Waring* v. *The Mayor*, 8 Wall, 110, 122. The importer had the right to sell not only personally, but he had the right to employ an agent to sell for him. Otherwise his right to sell would be substantially valueless, for it cannot be supposed that he would be personally engaged in the sale of every original package sent to the different States in the Union. Having the right to sell through his agent, a sale thus effected is valid.

The right of the importer to sell cannot depend upon whether the original package is suitable for retail trade or not. His right to sell is the same, whether to consumers or to wholesale dealers in the article, provided he sells them in original packages. This does not interfere with the acknowledged right of the State to use such means as may be necessary to prevent the introduction of an adulterated article, and for that purpose to inspect and test the article introduced, provided the state law does really inspect and does not sub-

stantially prohibit the introduction of the pure article and thereby interfere with interstate commerce. It cannot for the purpose of preventing the introduction of an impure or adulterated article absolutely prohibit the introduction of that which is pure and wholesome. The act of the legislature of Pennsylvania, under consideration, to the extent that it prohibits the introduction of oleomargarine from another State and its sale in the original package, as described in the special verdict, is invalid.

The judgments are therefore reversed and the cases remanded to the Supreme Court of Pennsylvania for further proceedings not inconsistent with this opinion.

MR. JUSTICE GRAY, with whom concurred MR. JUSTICE HARLAN, dissenting.

Mr. Justice Harlan and myself cannot concur in this judgment, and will state, as briefly as may be, some of the grounds of our dissent. The question at issue appears to us to be so completely covered by two or three recent judgments of this court, as to make it unnecessary to cite other authorities.

As has been said by this court, speaking by the present Chief Justice, "The power of the State to impose restraints and burdens upon persons and property, in conservation and promotion of the public health, good order and prosperity, is a power originally and always belonging to the States, not surrendered by them to the General Government, nor directly restrained by the Constitution of the United States, and essentially exclusive. And this court has uniformly recognized state legislation, legitimately for police purposes, as not, in the sense of the Constitution, necessarily infringing upon any right which has been confided, expressly or by implication, to the National Government." *Rahrer's case*, 140 U. S. 545, 554.

The statute of Pennsylvania of May 21, 1885, under which the plaintiffs in error were indicted and convicted, for selling in Pennsylvania oleomargarine in the original packages in

which it had been sent to them from other States, provides that "no person, firm, or corporate body shall manufacture out of any oleaginous substance or any compound of the same, other than that produced from unadulterated milk or of cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk or cream from the same, or of any imitation or adulterated butter or cheese, nor shall sell or offer for sale, or have in his, her or their possession with intent to sell the same, as an article of food." Penn. Stat. 1885, c. 25.

In *Powell* v. *Pennsylvania*, 127 U. S. 678, the defendant was indicted, under this very statute, for selling, and for having in his possession with intent to sell, oleomargarine manufactured in Pennsylvania before the passage of the statute; and, at the trial, in order to show that the statute was not a lawful exercise of the police power of the State, offered to prove that the articles which he sold, and those which he had in his possession for sale, were, in fact, wholesome and nutritious, and were part of a large quantity manufactured by him before the passage of the statute, by the use of land, buildings and machinery, purchased by him at great expense for carrying on this business, and the value of which would be destroyed if he were prevented from continuing it. The evidence offered was excluded, and the defendant was convicted; and his conviction was affirmed by the Supreme Court of Pennsylvania, and by this court upon writ of error.

This court, in its opinion upholding this statute as a constitutional and valid exercise of the police power of the State, after mentioning the defendant's offer to prove that the articles which he sold or had in his possession for sale were in fact wholesome and nutritious, proceeded as follows: "It is entirely consistent with that offer, that many, indeed, that most kinds of oleomargarine butter in the market contain ingredients that are or may become injurious to health. The court cannot say, from anything of which it may take judicial cognizance, that such is not the fact. Under the circumstances disclosed in the record, and in obedience to settled rules of constitutional construction, it must be assumed that

such is the fact." "Whether the manufacture of oleomargarine, or imitation butter, of the kind described in the statute, is, or may be, conducted in such a way, or with such skill and secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business, rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy, which belong to the legislative department to determine. And as it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts. It is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions." "The legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale, or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds, other than those produced from unadulterated milk or cream from unadulterated milk, to take the place of butter produced from unadulterated milk or cream from unadulterated milk, will promote the public health, and prevent frauds in the sale of such articles." 127 U. S. 684–686.

That decision appears to us to establish that the courts cannot take judicial cognizance, without proof, either that oleomargarine is wholesome, or that it is unwholesome; and we are unable to perceive how judicial cognizance of such a fact can be acquired by referring to the various opinions which have found expression in scientific publications, or in testimony given in cases before other courts and between other parties.

Evidence that the articles sold were wholesome and nutritious having been excluded as immaterial when offered in defence in *Powell's case*, it necessarily follows that the Commonwealth in the case at bar had no occasion to offer evidence to prove the contrary.

The decision in *Powell's case* conclusively establishes that the statute in question is a constitutional exercise of the police power of the State, unless it can be considered as affected by the power to regulate commerce, as granted to or exercised by Congress under the Constitution of the United States.

The act of Congress of August 2, 1886, c. 840, imposing internal revenue taxes upon manufacturers and sellers of oleomargarine, and defining what shall be considered as oleomargarine for the purposes of that act, expressly provides, in § 3, that section 3243 of the Revised Statutes, so far as applicable, shall apply to such taxes and persons. 24 Stat. 209. By section 3243 of the Revised Statutes, "the payment of any tax imposed by the internal revenue laws for carrying on any trade or business shall not be held to exempt any person from any penalty or punishment provided by the laws of any State for carrying on the same within such State, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such State, or in places prohibited by municipal law; nor shall the payment of any such tax be held to prohibit any State from placing a duty or tax on the same trade or business, for state or other purposes."

As was said by this court in *Plumley* v. *Massachusetts*, 155 U. S. 461, "It is manifest that this section was incorporated into the act of August 2, 1886, to make it clear that Congress had no purpose to restrict the power of the States over the subject of the manufacture and sale of oleomargarine within their respective limits. The taxes prescribed by that act were imposed for national purposes, and their imposition did not give authority to those who paid them to engage in the manufacture or sale of oleomargarine in any State which lawfully forbade such manufacture or sale, or to disregard any regulations which a State might lawfully prescribe in

reference to that article. Nor was the act of Congress relating to oleomargarine intended as a regulation of commerce among the States. Its provisions do not have special application to the transfer of oleomargarine from one State of the Union to another. They relieve the manufacturer or seller, if he conforms to the regulations prescribed by Congress, or by the Commissioner of Internal Revenue under the authority conferred upon him in that regard, from penalty or punishment, so far as the General Government is concerned; but they do not interfere with the exercise by the States of any authority they possess of preventing deception or fraud in the sales of property within their respective limits." 155 U. S. 466, 467. "If there be any subject over which it would seem the States ought to have plenary control, and the power to legislate in respect to which it ought not to be supposed was intended to be surrendered to the General Government, it is the protection of the people against fraud and deception in the sale of food products. Such legislation may, indeed, indirectly or incidentally affect trade in such products transported from one State to another State. But that circumstance does not show that laws of the character alluded to are inconsistent with the power of Congress to regulate commerce among the States." 155 U. S. 472.

In *Plumley's case*, it was accordingly adjudged by this court, affirming the judgment of the Supreme Judicial Court of Massachusetts, that a statute of Massachusetts, imposing a penalty on the manufacture, sale, offering for sale, or having in possession with intent to sell, "any article or compound, made wholly or partly out of any fat, oil or oleaginous substance, or compound thereof, not produced from unadulterated milk or cream from the same, which shall be in imitation of yellow butter produced from pure unadulterated milk or cream from the same," was constitutional and valid, as applied to sales in Massachusetts of oleomargarine made in another State, artificially colored so as to look like yellow butter, and imported in the packages in which it was sold.

The necessary result of the decisions in *Powell's case* and in *Plumley's case*, and of the reasoning upon which those deci-

sions were founded, and by which alone they can be justified, appears to us to be that each State may, in the exercise of its police power, without violating the provisions of the Constitution and laws of the United States concerning interstate commerce, make such regulations relating to all sales of oleomargarine within the State, even in original packages brought from another State, as the legislature of the State may deem necessary to protect the people from being induced to purchase articles, either not fit for food, or differing in nature from what they purport to be; that the questions of danger to health, and of likelihood of fraud or deception, and of the preventive measures required for the protection of the people, are questions of fact and of public policy, the determination of which belongs to the legislative department, and not to the judiciary; and that, if the legislature is satisfied that oleomargarine is unwholesome, or that, in the tubs, pots or packages in which it is commonly offered for sale, it looks so like butter, that the only way to protect the people against injury to health, in the one case, or against fraud or deception, in the other, is to absolutely prohibit its sale, it is within the constitutional power of the legislature to do so.

COLLINS *v.* NEW HAMPSHIRE.

171 30
L-ed 60
196 f 967
97 f 776

ERROR TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE.

No. 17. Argued March 23, 24, 1898. — Decided May 23, 1898.

171 30
L-ed 60
180 503
180 505

Following the decision in *Schollenberger* v. *Pennsylvania*, *ante*, 1, the court holds that the statute of New Hampshire prohibiting the sale of oleomargarine as a substitute for butter, unless it is of a pink color, is invalid, as being, in necessary effect, prohibitory.

171 30
43 L-ed 60
112 f 912

171 30
43 L-ed 60
s18 SC 768
j188 369

THE case is stated in the opinion. It was argued with *Schollenberger* v. *Pennsylvania*, *ante*, 1, by the same counsel for plaintiff in error.

Mr William D. Guthrie for plaintiff in error. *Mr. Richard*

Opinion of the Court.

C. Dale, Mr. Henry R. Edmunds and *Mr. Albert H. Veeder* were on his brief.

Mr. John G. Johnson was for the defendant in error in *Schollenberger* v. *Pennsylvania*, argued with this case; but there was no appearance for the defendant in error in this case.

Mr. Justice Peckham delivered the opinion of the court.

This case comes here by virtue of a writ of error to the Supreme Court of the State of New Hampshire, by which we are called upon to review the judgment of that court sustaining a conviction of the plaintiff in error in the court of first instance of a violation of the public statutes of the State, prohibiting the sale of oleomargarine as a substitute for butter unless it is of a pink color. The law is to be found in sections 19 and 20, chap. 127, Public Statutes, 1891. The two sections are set forth in the margin.[1]

The plaintiff in error was convicted of selling a package of

[1] § 19. It shall be unlawful to sell, offer for sale, or keep in possession with intent to sell, in this State, any substance or compound made wholly or in part of fats, oils or grease, not produced from milk or cream, in imitation of, or as a substitute for, butter or cheese, unless the same is contained in tubs, firkins, boxes or other packages, each of which has upon it, to indicate the character of its contents, the words "Adulterated butter," "Oleomargarine," or "Imitation cheese" as the case may be, in plain roman letters not less than one half inch in length, and so placed and made or attached that they can be readily seen and read and cannot be easily defaced; and if the substance or compound is a substitute for cheese, unless the cloth surrounding it has a like inscription; and if it is a substitute for butter, unless it is of a pink color. When any such substance or compound is sold in less quantities than the original packages contain, the seller shall deliver to the purchaser with it a label bearing the words indicating its character as above, in like letters.

§ 20. If any person shall sell, or offer for sale, or keep in possession with intent to sell, in this State, any substance or compound of the kinds described in the preceding section in a manner that is made unlawful by said section, or shall sell, offer for sale, or keep in possession with intent to sell, any such substance or compound without disclosing its true character, he shall be fined not more than one hundred dollars, or be imprisoned not more than sixty days, or both.

oleomargarine not of pink color in violation of the statute and was sentenced to pay a fine of $100, and to pay the costs of prosecution and to stand committed until sentence was performed.

The following are the facts appearing in the record:

"The respondent is agent at Manchester of Swift & Co., an Illinois corporation, having its principal place of business in Chicago. The corporation manufactures oleomargarine and puts it up in packages in Chicago, and distributes the packages from there to different places — one of which is Manchester — where it maintains stores and sells the article at wholesale in the original packages. It has paid the special United States taxes imposed by the act of Congress of August 2, 1886 (Supp. to R. S. of U. S., v. 1, p. 505), and has complied with all other requirements of that act in respect to the manufacture and sale at wholesale of oleomargarine. The article has the color of butter, the same coloring matter being used to color it that is frequently used to color butter, and is made wholly or in part of fats, oils or grease not produced from milk or cream, in imitation of or as a substitute for butter. It is not manufactured in this State. The respondent as such agent sold in Manchester, at wholesale, at the store of the company, a package of said article weighing ten pounds in the form it was put up in Chicago by his principal. The provisions of section 19, chapter 127, Public Statutes of this State, were complied with, so far as the package was concerned, except the color of its contents was not pink. The oleomargarine sold was the oleomargarine of commerce as the same is known and dealt in as an article of food.

"The respondent claimed that upon these facts he was not guilty, because the statute of this State is in contravention of the Constitution of the United States and its amendments and of the laws of Congress; otherwise he admitted his guilt. The court ruled against the respondent as to the above claim, and he excepted."

It was stated on the argument that since the conviction of the plaintiff in error the statute above cited had been repealed, but that such repeal did not affect the conviction, because of

the provision made in the New Hampshire statutes that "no suit or prosecution, pending at the time of the repeal of an act, for any offence committed or for the recovery of a penalty or forfeiture incurred, under the act so repealed, shall be affected by such repeal." We are therefore called upon to determine the validity of the conviction.

The plaintiff in error claims that the statute under which he was indicted and convicted is void, because in contravention of the Constitution of the United States, which gives power to Congress "to regulate commerce with foreign nations and among the several States and with the Indian tribes."

We think this case comes within the principle of the cases just decided regarding the statute of the Commonwealth of Pennsylvania prohibiting the introduction of oleomargarine into that Commonwealth. This statute is in its practical effect prohibitory. It is clear that it is not an inspection law in any sense. It provides for no inspection, and it is apparent that none was intended. The act is a mere evasion of the direct prohibition contained in the Pennsylvania statute, and yet if enforced the result, within the State, would be quite as positive in the total suppression of the article as is the case with the Pennsylvania act.

In a case like this it is entirely plain that if the State has not the power to absolutely prohibit the sale of an article of commerce like oleomargarine in its pure state, it has no power to provide that such article shall be colored, or rather discolored, by adding a foreign substance to it, in the manner described in the statute. Pink is not the color of oleomargarine in its natural state. The act necessitates and provides for adulteration. It enforces upon the importer the necessity of adding a foreign substance to his article, which is thereby rendered unsalable, in order that he may be permitted lawfully to sell it. If enforced, the result could be foretold. To color the substance as provided for in the statute naturally excites a prejudice and strengthens a repugnance up to the point of a positive and absolute refusal to purchase the article at any price. The direct and necessary result of a statute

must be taken into consideration when deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect. *Henderson* v. *Mayor of New York*, 92 U. S. 259; *Morgan's Steamship Co.* v. *Louisiana*, 118 U. S. 455, at 462. Although under the wording of this statute the importer is permitted to sell oleomargarine freely and to any extent, provided he colors it pink, yet the permission to sell, when accompanied by the imposition of a condition which, if complied with, will effectually prevent any sale, amounts in law to a prohibition.

If this provision for coloring the article were a legal condition, a legislature could not be limited to pink in its choice of colors. The legislative fancy or taste would be boundless. It might equally as well provide that it should be colored blue or red or black. Nor do we see that it would be limited to the use of coloring matter. It might, instead of that, provide that the article should only be sold if mixed with some other article which, while not deleterious to health, would nevertheless give out a most offensive smell. If the legislature have the power to direct that the article shall be colored pink, which can only be accomplished by the use of some foreign substance that will have that effect, we do not know upon what principle it should be confined to discoloration, or why a provision for an offensive odor would not be just as valid as one prescribing the particular color. The truth is, however, as we have above stated, the statute in its necessary effect is prohibitory, and therefore upon the principle recognized in the Pennsylvania cases it is invalid.

The judgment of the Supreme Court of New Hampshire is reversed and the case remanded to that court for further proceedings not inconsistent with this opinion.

Mr. Justice Harlan and Mr. Justice Gray dissented.